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Office of the Chairman
Administrative Conference of the United States

Administrative Conference of the United States

Recommendations and Reports

1989

Administrative Conference of the United States

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To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished through direct action on the part of the affected agencies or legislative changes.

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RECOMMENDATIONS AND STATEMENTS

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Recommendation 89-1

Peer Review and Sanctions in the Medicare Program

As the Administrative Conference noted in Recommendation 86-5[1], the Medicare program relies heavily on implementation of federal requirements by localized carriers, intermediaries and, increasingly, peer review organizations (PROs).

The PRO system was created in 1982. It is made up of statewide, physician-controlled organizations under individual contracts with the Department of Health and Human Services (HHS). These contracts are negotiated pursuant to a general contractual "Scope-of-Work" promulgated by HHS every three years. PROs are delegated a number of important responsibilities under the Medicare system. They identify substandard, unnecessary or inappropriate services rendered to Medicare beneficiaries, and oversee education and corrective actions for substandard providers (e.g., hospitals) and medical practitioners. They also recommend to HHS that it sanction providers and practitioners when they find seriously improper practices, deny Medicare payment for inappropriate or unnecessary services, and protect the rights of beneficiaries.

This recommendation follows the suggestion made in Recommendation 86-5 that the PRO program was deserving of further study. It recognizes the evolutionary nature of the PRO's role in Medicare, and the administrative difficulties posed for HHS in overseeing this decentralized program -- especially since new legislative directions affecting the program appear regularly, often contained in year-end omnibus budget reconciliation acts. Nevertheless, the Conference urges the Department (and, where necessary, Congress) to make changes designed to improve the accessibility of PRO-related policies, the fairness and firmness of PRO sanctions imposed on providers and practitioners, and the effectiveness of PRO safeguards for beneficiary rights.

In Paragraph A of the Recommendation, the Conference urges several enhancements of HHS' current practices in disseminating, making accessible, and soliciting comments on, PRO program guidelines of general applicability, including the scopes of work, manuals, and the criteria and norms used to evaluate medical care. Paragraph B seeks to promote improvements in the PRO's assigned duty of investigating complaints by beneficiaries, and urges Congress to allow PROs to act in response to oral complaints.

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[1] ACUS Recommendation 86-5, *Medicare Appeals*, 1 C.F.R. 305.86-5.

Paragraph C recommends invigorating the process of investigating and adjudicating sanctions against health care practitioners and providers charged with violations of their obligations under the Medicare program. The current sanction process begins when a PRO gives formal notice to the practitioner or provider involved that it considers that poor quality care may have been rendered or that other violations have occurred. The PRO is required to have at least one quite formalized meeting with the practitioner or provider to discuss the allegations that the care rendered either "failed in a substantial number of cases substantially to comply" with the statutory obligation to render proper medical care, or "grossly and flagrantly violated such obligations in one or more instances." 42 U.S.C. 1320c-5(b). (In the former type of case, at least two meetings are required.) If, after the meeting, the PRO believes that violations have occurred, it recommends to the HHS Office of Inspector General (OIG) that a sanction be imposed, either in the form of an exclusion from participation in the Medicare program for some period of time, or a civil monetary penalty of no more than the amount of the cost of medically improper or unnecessary services. If the OIG agrees that violations have occurred, and in addition finds that the practitioner or provider is unwilling or unable to comply with the obligations to render proper care, the OIG may impose one of these sanctions. If the sanction is exclusion, it becomes effective fifteen days after notice.[2] The sanction is appealable to an ALJ, then to the Appeals Council; judicial review is subsequently available.

This recommendation seeks to balance the vital interest in protecting the health and safety of program beneficiaries and the need to assure fairness to the accused provider or practitioner whose livelihood is at stake and whose services might be needed. The Conference urges that the current PRO sanction process be streamlined. It also urges that all providers and practitioners, not just some, be permitted to seek a stay of an HHS order to exclude them from the Medicare program, in a proceeding akin to that of a temporary restraining order at the administrative law judge adjudication stage of that process. However, the burden would be on the practitioner or provider to show that no serious risk would be posed to beneficiaries during the pendency of the administrative appeal. The Conference also urges legislative changes that, while maintaining the requirement that the OIG prove that violations have occurred, would eliminate the additional requirement of proving that the practitioner or provider is unwilling or unable to comply with the obligations to provide quality care. The offenses or oversights, which have been found both by peers (PROs) and regulators (OIG) to be substantial or gross and flagrant, already serve as indicators of inability or unwillingness to comply. Under the current law, before excluding a provider or practitioner on the basis of these findings, the government must bear an additional evidentiary burden that is inappropriate for this type of proceeding. It must prove what amounts to a speculative negative -- that violators would be unwilling or unable to comply with the law in the future. The apparent result of this evidentiary requirement has been to chill the initiation of exclusion proceedings against providers and practitioners who are providing improper care or otherwise violating the law. Further, the Conference recommends legislative changes to provide for meaningful civil money penalties, as well as for the current sanction of excluding providers and practitioners from the program. It should be noted that the Conference views the changes in the sanction procedure contained in this paragraph as a unified package, one that in its present form balances conflicting interests but that will become unbalanced if any one significant portion were not to be accepted.

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[2] Certain practitioners in rural areas are permitted to have the exclusion stayed, pending OIG proof that the practitioner would pose a "serious risk" to program beneficiaries if allowed to remain in the program during the pendency of the administrative appeal.

Paragraph D urges changes in the PRO statute and regulations to ensure that beneficiaries are better informed of their rights to appeal decisions concerning their lack of coverage or discharge from a hospital or other facility, and that they will not be discharged until such appeals are resolved. Paragraph E covers the PRO's role in denials of payment for care determined to be unnecessary, substandard or rendered in an inappropriate setting. It recommends that HHS implement in final rules 1985 legislation concerning PRO denials for substandard care.[3] It also urges HHS to amend its rules to require that PROs not make any final decisions affecting payment without adequate review by medical practitioners who are qualified in the relevant area. Finally, Paragraph F urges HHS to take steps to permit PROs to share information with provider facilities and state medical boards.

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[3] On January 18, 1989, HHS published a proposed rule covering this subject. 54 Fed. Reg. 1956.

RECOMMENDATION

A. Publication and Dissemination of PRO Program Guidelines

1. HHS should enhance its current practice of publishing and disseminating all Peer Review Organization (PRO) program rules having a substantial effect on providers, medical practitioners and beneficiaries by taking the following steps:

   (a) Notice-and-comment procedures should be used for rulemaking except when the agency for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.[4]

   (b) Proposed PRO "scopes of work" and any generally applicable modifications or interpretations of the responsibilities of PROs during a contract cycle should be published in the Federal Register and disseminated to relevant interest groups. Interested parties should be allowed 30-45 days for commenting, unless explicit Congressional deadlines would be contravened thereby, or unless there is good cause for immediate implementation.

   (c) HHS should make PRO contracts, manual instructions, and other guidelines of general applicability regarding the PRO program readily available to the public at convenient locations, including social security offices. HHS should publish an updated list of such materials in the Federal Register at least quarterly.

2. HHS should encourage PROs to use outreach and consensus-building techniques analogous to negotiated rulemaking when they are developing criteria and norms for

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[4] *See* ACUS Recommendation 83-2, *The "Good Cause" Exemption from APA Rulemaking Requirements*, 1 C.F.R. 305.83-2.

PRO review of the quality, necessity and appropriateness of medical care.[5] HHS should further encourage PROs to make these criteria and norms consistent nationwide.

B. PRO Investigations of Beneficiary Complaints

1. Congress and HHS should coordinate the system of PRO review of beneficiary complaints concerning quality of services with other federal and state regulatory schemes. Initially, priority consideration should be given to complaint investigations in the hospital setting, where PROs have the most expertise and where alternative means to investigate complaints are least available.

2. Congress should amend 42 U.S.C. 1320c-3(a)(14) to permit PROs to investigate and otherwise act on oral complaints concerning the quality of services. Until it does so, HHS should require PROs to receive such oral complaints from beneficiaries or witnesses, and reduce them to writing, before acting on them.

3. HHS should require PROs to use investigative techniques that, so far as may be feasible, protect from disclosure the identity of complainants who do not expressly and voluntarily consent to such disclosure. Where the identity of a complainant who desires anonymity cannot be kept confidential, the PRO should give the complainant the option of withdrawing the complaint in lieu of disclosure, although the PRO may at its discretion continue to investigate the underlying problem.

4. HHS should amend the PRO Scope of Work to conform to the 1986 Omnibus Budget Reconciliation Act by requiring PROs to inform beneficiaries fully regarding the final disposition of all complaints, whether involving providers or practitioners. PROs also should be required promptly to inform providers and practitioners of the final disposition of investigations involving them.

5. HHS should establish guidelines and a significantly more expedited schedule than the current several-month process for PROs to complete initial investigations of complaints of potentially life-threatening quality deficiencies. HHS also should establish procedures for receiving and acting on requests for intervention in cases where PROs do not process complaints on a timely basis.

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[5] *See* ACUS Recommendations 82-4, 85-5, Procedures for Negotiating Proposed Regulations, 1 C.F.R. 305.82-4, 85-5.

C. Sanctions Against Providers or Practitioners Who Have Provided Improper or Unnecessary Services

Congress should streamline the sanction process by taking the following interrelated steps to promote heightened enforcement, while preserving fairness to the accused provider or practitioner:

1. HHS should seek to ensure greater uniformity among PROs through training and the development of a model sanction referral form. To preserve needed healthcare resources, HHS and the PROs should continue to emphasize education and corrective action rather than sanctions as the primary means of addressing quality problems. HHS should also amend its rules (a) to require that, once a PRO determines that there is a quality problem for which a sanction is the appropriate intervention, it immediately start +the sanction process, and (b) to provide that, ordinarily, there will be only one formal meeting between the PRO and the accused provider or practitioner after the sanction proceeding has been initiated.

2. Congress should amend the PRO statute to offer all providers and practitioners (urban and rural), upon their receipt of an HHS notice of exclusion pursuant to 42 U.S.C. 1320c-5(b), the opportunity for a preliminary hearing and decision. Such a proceeding would be conducted by an ALJ on the issue of whether the provider or practitioner would pose a serious risk to patients during the pendency of the subsequent ALJ proceeding on the merits of the exclusion. The preliminary hearing would be in the nature of a temporary restraining order proceeding, and would arise and be conducted according to the following procedures:

   (a) If, within 10 days of receipt of notice of the exclusion, the provider or practitioner appeals the decision of the HHS Office of Inspector General (OIG) imposing an exclusion, a preliminary hearing on the "serious risk" issue should take place before the exclusion takes effect.

   (b) If the provider or practitioner establishes at the preliminary hearing that continued participation in the Medicare program pending the ALJ's decision on the underlying appeal will not pose a serious risk to patients, or that such participation can be restricted to preclude such risk, the HHS exclusion order shall be stayed or modified by the ALJ until the ALJ issues a final decision on the merits of the exclusion.

(c) The ALJ must render the preliminary decision on the "serious risk" issue as quickly as possible but within no more than 30 days after the filing of the appeal, and a final decision on the exclusion within a time period reflecting assignment of the highest priority to the adjudication.

3. Congress should retain the requirement in 42 U.S.C. 1320c-5(b)(1) that sanctions be based on determinations that a practitioner or provider has either (A) "failed in a substantial number of cases substantially to comply" with statutory obligations to render appropriate and quality care, or (B) "grossly and flagrantly violated such obligations in one or more instances." However, Congress should eliminate the separate and additional requirement in 42 U.S.C. 1320c-5(b)(1) that the OIG must determine the provider's or practitioner's "unwillingness or lack of ability substantially to comply" with program obligations before imposing sanctions on the provider or practitioner.

4. Currently the PRO statute [42 U.S.C. 1320c-5(b)(3)] limits monetary penalties to "the actual or estimated cost of . . . medically improper or unnecessary services." In order to provide for a wider range of sanctions, Congress should amend the PRO statute to allow the OIG to assess a substantial civil money penalty for each violation against providers and practitioners who are found to have grossly and flagrantly violated their obligations on one or more occasions, or to have substantially violated such obligations in a substantial number of cases. The OIG should be given the discretion to impose such monetary penalties in addition to an exclusion where appropriate.

5. HHS should assign PRO sanction cases to ALJs attached to the Departmental Appeals Board (who currently hear other sanction cases in the Department) rather than to Social Security ALJs, as is the current practice.

D. Notice to Beneficiaries of Noncoverage

1. Congress should amend 42 U.S.C. 1320c-3(e)(3) to assure that hospitalized beneficiaries who appeal the hospital's notice of noncoverage by noon of the day following receipt of the notice, should not have such coverage discontinued until the PRO rules on their request for review.

2. HHS should amend the PRO regulations to assure that, at the time a hospital informs beneficiaries of its

decision to discharge them or of the discontinuance of coverage, they are informed of their discharge appeal rights under the PRO program.

3. The notice of a right to appeal should be on a form drafted by HHS (developed in consultation with beneficiary organizations and other interested parties), and should include a concise and easily understood statement of the basic beneficiary right to a no-liability appeal to the PRO. If the current system of separate appeal tracks (depending on whether the hospital and attending physician concur or not) is retained, separate notices should be given for each track to avoid the confusion caused by a notice that describes multiple procedures.

E. PRO Denials of Payment for Substandard or Unnecessary Care

1. HHS should proceed expeditiously to final rulemaking to implement PRO authority, contained in 42 U.S.C. 1320c-3(a)(2), to deny payment to practitioners or providers for care that does not meet professionally recognized standards.

2. HHS should require by regulation that PROs not make final utilization review denials (denials of payment for care that has been determined to be unnecessary or rendered in an inappropriate setting) until a proposed denial and the response to it by the affected provider or practitioner have been reviewed by at least one practitioner qualified by professional training and experience relevant to the matters in controversy. Although HHS should at a minimum apply the same standard to reviews of denials of payment for failure to meet professional standards of care, it may be appropriate in this context to require that the review be performed by a physician practicing in the same care specialty.

F. PRO Sharing of Information

1. HHS should issue PRO manual instructions and amend the Scope of Work in order to implement the Congressional mandate requiring the sharing of information among the PROs and state medical boards and licensing authorities regarding practitioners and providers who violate quality standards, and should modify its current confidentiality and disclosure regulations to require that a copy of any PRO final sanction recommendation be provided

to such bodies. HHS should explore the feasibility of including sanction recommendations in the National Practitioner Data Bank.

2. HHS should amend PRO regulations to require PROs to share with hospitals information about confirmed violations of quality of care standards involving doctors on the staffs of such hospitals, including the contents of corrective action plans.

Recommendation 89-2

Contracting Officers' Management of Disputes

An increasing number of problems in the management of government contracts are now referred to lawyers, accountants, and judges for resolution. This accelerating trend has tended to deemphasize the responsibility of the agency contracting officers, who (in most agencies) have traditionally played a key role in the procurement process, including dispute handling.[1] Many contracting officers ("COs") today are subject to restrictive regulations and close oversight that can inhibit their willingness to negotiate settlements. For this and other reasons, many cases proceed to needless litigation that are in fact susceptible to prompt, direct resolution by COs at an early stage when parties are often less entrenched and more cognizant of program interests.[2]

Several Conference studies have demonstrated opportunities for improving agencies' resolution of contract disputes consonant with the Contract Disputes Act's[3] goal of expeditious resolution without disrupting performance.[4] While a few agencies have experimented with alternative means of dispute resolution at the appeal level, these methods are even more likely to be useful prior to issuance of a contracting officer decision. This potential has been neglected. Current training for COs does not address ADR and gives minimal attention to negotiation skills. These methods[5] serve the agency by helping to expedite dispute handling. They serve the parties by keeping outcomes in the control of the contracting parties, preserving cooperative business relations, avoiding litigation (and the concomitant loss of control as to results), and--most important--allowing the parties to return to concentrating on productive work rather than conflict.

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[1] Conference Recommendation 87-11, *Alternatives for Resolving Government Contract Disputes*, 1 CFR 306.87-11, describes one aspect:

> The dispute handling system established by the Contract Disputes Act begins with the contracting officer ("CO"), an agency official whose function is to enter into and administer government contracts. Any claim arising out of a contract is to be presented to the CO. The CO has a dual role: to represent the government as a party to the contract, but also to make initial decisions on claims subject to certain procedural safeguards. If the dispute is not amicably resolved, the CDA requires the CO to issue a brief written decision stating his or her reasons. A contractor dissatisfied with a CO's decision may appeal either to an agency board of contract appeals or directly to the U.S. Claims Court, where proceedings become considerably more formal.

[2] This report addresses only dispute resolution during contract performance; it does not extend to controversies which arise during the contract formation process.

[3] 41 U.S. Code 601-613; 5 U.S.C. 5108(c)(3); 28 U.S.C. 1346(a)(2), 149(a)(2), 2401(a), 2414, 2510, 2517, 31 U.S.C. 1304(a)(3)(C) (1982); enacted November 1, 1978 by Pub. L. No. 95-563, 92 Stat. 2383.

[4] Section 33.204 of the Federal Acquisition Regulation, which guides agency procurement practices, includes the following possible inducement to ADR:

This recommendation builds on an earlier one (87-11), in which the Conference focused primarily on possible uses for consensual means of resolving contract disputes at the appeal level. It identified the decreased authority of COs as a major factor contributing to the inefficiency and cost of resolving many conflicts. Recommendation 87-11 (in pertinent part) calls for (1) legislation, an executive order, by the Office of Federal Procurement Policy, policy statement, and Federal Acquisition Regulation changes to encourage COs, before issuing a decision likely to be unacceptable to a claimant, to explore use of ADR to resolve their differences; (2) agency adoption of policies encouraging ADR and regular use of rules or notices to alert COs and other parties to ADR availability; (3) agency designation of an employee to serve as an ADR specialist in connection with contract disputes; and (4) agency attention to the need to offer training in negotiation and other ADR skills to COs and others involved in contract disputes.

The instant recommendation seeks to go further to enhance the CO's ability and authority in the resolution of contract disputes. Calling for CO training in negotiation and dispute handling, as well as increased use of ADR techniques as part of a CO's decisionmaking process, it supplements the prior

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> In appropriate circumstances, the contracting officer, before issuing a decision on a claim, should consider the use of informal discussions between the parties by individuals who have not participated substantially in the matter in dispute, to aid in resolving the differences.

This suggestion for a "fresh look" at the issues recognizes the potential usefulness of an objective evaluation.

[5] They include arbitration, mediation, minitrial, factfinding, convening, facilitation and negotiation. These are defined in the Appendix to Conference Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 1 CFR 306.86-3.

recommendation by focusing on the integration of consensual dispute resolution into already existing dispute and training systems at the CO level, overcoming obstacles to ADR use, and practical guidance in improving CO- level dispute resolution.

RECOMMENDATION

1. Agencies with significant acquisition activity, acting in consultation with expert groups, should encourage COs, and other key personnel involved in the resolution of contract disputes, to make greater efforts routinely to consider and utilize ADR to help resolve claims. Since dispute resolution at the CO level is very much a shared activity, these persons may include program and project managers, attorneys, auditors, engineers, specialists in pricing, packaging, production, maintenance and quality control, and other technical experts or contracting officials. These agencies should undertake comprehensive programs of promoting ADR at the CO level. The programs should include application of ADR techniques in specific test cases, conduct of training, case screening, and information and guidance for personnel and contractors.

2. Agency heads should direct senior officials within the acquisition hierarchy to act as proponents for dispute resolution, with the specific mission of developing more effective contact dispute resolution practices. Agencies with extensive acquisition activity should designate a senior official within the acquisition hierarchy with the specific mission of developing more effective contract disputes resolution practices. This official's mission would include challenging barriers to wider ADR use, educating disputants in industry and government, and improving understanding and use of ADR procedures at the CO level.

3. The Federal Acquisition Regulation should be amended to describe specifically the full range of dispute resolution methods available for consideration by the parties at or before the time a claim is presented to the CO for resolution under the Contract Disputes Act.

4. COs involved in the disputes process should be specifically evaluated, as part of the annual performance evaluation cycle, on their effectiveness in managing contract disputes.

5. In addition to those techniques set forth in Recommendation 87-11, agencies should be encouraged to use the following specific methods in CO-level disputes:

(a) Employing factfinding to offer an advisory decision, or designating a CO who was not involved in the disputed issues, or a particular distinguished government official or other knowledgeable person, to make an advisory decision;

(b) Employing minitrial or other processes to permit a structured presentation of facts and arguments to the CO or other government officer with authority to settle;

(c) Agreeing in advance that disputes arising under a particular contract will be voluntarily submitted to an expert or panel for a nonbinding opinion as soon as a disagreement occurs; and

(d) Encouraging agency COs to employ the services of mediators or other neutrals to enhance negotiations to settle contract disputes.

6. Board of Contract Appeals judges should take greater advantage of opportunities to suggest returning to the CO cases which evidently should be pursued more vigorously for settlement.

7. ADR training programs, for both industry and government personnel, should be integrated into existing management training programs, as follows:

(a) Training should focus on the use of these techniques as tools to improve the contract formation and contract administration process, so as to abate conditions which later lead to disputes, and to expedite decisionmaking under the Contract Disputes Act.

(b) Training should reflect the fact that negotiation is a key dispute resolution method, and that most COs would become more effective professionals by devoting increased training and attention to these methods. The Federal Acquisition Institute and other government entities specializing in acquisition training should devote increased attention to listening and communications skills, use of "interest" and "principled" rather than "positional" bargaining, and systematic attention to negotiation techniques. The training should also enable a CO to engage in meaningful discussion with a contractor by first working as a "team builder" to develop a coherent intraagency position that takes into account the views and needs of attorneys, auditors, program managers, engineers and others within the agency. Consistent with best management practice and the Packard Commission Report for greater efficiency in procurement,[6] the training should encourage the CO, even without the assistance of a third-party neutral, to avert appeals by reducing the number of situations where disputes, encumbered by internal disagreements or incoherent positions, are passed on to boards of contract appeals.

(c) Professional organizations concerned with the public contract disputes process, such as the American Bar Association, Federal Bar Association, and National Contract Management Association, should develop and encourage increased learning opportunities in effective dispute resolution techniques for representatives of the government and private sector.

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[6] *A Quest for Excellence*, Final Report by the President's Blue Ribbon Commission on Defense Management (June 1986).

Recommendation 89-3

Conflict-of-Interest Requirements for Federal Advisory Committees

The law and practice regarding conflict-of-interest requirements for federal advisory committee members have developed from the interaction of three statutory schemes: the Federal Advisory Committee Act,[1] the conflict-of-interest laws, and the federal personnel laws. However, none of these statutory schemes was drafted to deal specifically with conflict-of-interest standards for government advisers.

In 1982 the Office of Government Ethics issued guidance to agencies that sought to meld a coherent analytical framework from the three statutory schemes. In determining whether the conflict-of-interest laws applied, the Office distinguished between those advisers who were selected as committee members because of their individual qualifications, and were thus deemed to be special government employees (SGE's), and those who instead were selected as representatives of nongovernmental groups or organizations (or in some cases, as independent contractors). While this guidance has reduced the confusion somewhat, the determination of a committee member's status as an SGE or a representative of a nongovernmental group or organization remains difficult, and agency practice in classifying advisory committee members as SGE's or representatives varies greatly and often appears arbitrary.

The classification of an advisory committee member as an SGE or a representative is significant because only the former are subject to the conflict-of-interest and financial disclosure laws. The most significant of these laws for advisory committee members is Section 208 of Title 18, United States Code, which makes it a criminal offense to participate "personally and substantially" as a government employee "through decision, *** recommendation, the rendering of advice, investigation, or otherwise in *** any particular matter in which to his knowledge, he, his spouse, minor child, partner, organization *** has a financial interest." The term "particular matter" in Section 208 has been interpreted broadly by the Department of Justice and the Office of Government Ethics to extend to all discrete matters that are the subject of agency action, including rulemaking and general policy matters.[2]

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[1] 5 U.S.C. App. I

Section 208 is especially a problem for advisory committee members. Often they have been selected precisely because they are especially well qualified to provide advice concerning problems in a particular field in which they themselves may be active both professionally and financially.

Because of its breadth, Congress provided for agency waivers of section 208's prohibition, either by rule or on a case-by-case basis, where the appointing official makes a determination that the employee's interest is too remote or insubstantial to affect the integrity of his or her services. Agencies, however, may be unable or reluctant under current law to grant a waiver where a financial interest is significant, even though the agency concludes that any bias arising from that interest will be offset through committee balance, disclosure of the interest, or the individual's status as only an adviser and not as a decisionmaker.

Faced with the specter of criminal liability and the limitations of waivers, or simply for administrative convenience, some agencies have adopted a policy of declaring most or all of their advisory committee members to be interest group representatives, rather than SGE's, except in the clearest cases. Thus, in practice, agencies may be requiring too little disclosure from members who are not SGE's, while imposing significant burdens, principally potential criminal liability, on those members who are SGE's.

In this recommendation the Conference urges the establishment of a uniform minimal disclosure requirement for all advisory committee members, whether or not they are classified as SGE's.[3] The recommendation seeks to balance the government's and the public's need for information to evaluate potential conflicts of interest and the burden placed on the individual who agrees to serve on an advisory committee, frequently without pay.

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[2] The test of whether a financial interest exists with respect to the matter is whether the government action in which the employee participates will have a "direct and predictable effect" on the entity in question. Participation in the presence of a known conflict constitutes a violation of section 208, whether or not the employee's action furthers or is likely to further his or her financial interest.

[3] The Conference recognizes that advisory committee members who are classified as special government employees may be required to furnish financial information pursuant to regulations of the appointing agency or the Office of Government Ethics. It is further noted that the Office of Government Ethics has

The Conference also recommends that Congress direct agencies to determine, when chartering or renewing the charter of an advisory committee, whether or not the committee's responsibilities require identifying its members as special government employees for purposes of the conflict-of-interest laws. The recommendation (2) includes criteria for making this determination. This approach places the burden of foreseeing and preventing conflicts of interest on the agency that seeks an individual's services on an advisory committee, rather than on the individual asked to serve, as does reliance on 208 waivers.

This recommendation does not extend to privately established advisory committees that are utilized for advice in particular matters because the members of these committees are not appointed by a federal agency. Consequently, an agency's relationship with such committees must be considered on a ad hoc basis. Nevertheless, the Conference believes agencies should be alert to possibilities for bias or self-interest in the advice of utilized committees and, where appropriate, should request information respecting the affiliations and interests of the members.

RECOMMENDATION

1. *Disclosure by Advisory Committee Members.*

(a) Congress should require that each individual selected to serve on a federal advisory committee, excluding a regular government employee, furnish to the agency or appointing authority at the time of the appointment or designation --

(1) the identity of the individual's principal employment;

(2) a list of positions held (whether paid or unpaid) and any contractual relationships for the performance

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under consideration a proposed regulation governing financial disclosure for all government employees, including special government employees.

of services with any corporation, company, firm, partnership or other business enterprise, any non-profit organization, any labor organization, or any educational or other institution whose activities or purposes may be (or may foreseeably become) relevant to the purposes and functions of the advisory committee as determined by the agency or appointing authority and described in the committee charter;

(3) the identity, but not value or amount, of any other sources of income or any interests in a trade or business, real estate, or other asset held for investment or production of income, exceeding $1,000 in value which are relevant to the purposes and functions of the advisory committee as determined by the agency or appointing authority and described in the committee charter;

(b) Advisory committee members should be required to file updated disclosure reports annually.

(c) The agency or appointing authority should make publicly available the information furnished pursuant to subparagraphs (a)(1) and (a)(2) above. The financial information described in subparagraph (a)(3) should ordinarily be held confidential unless the member consents to its release or the agency determines after consulting with the member that public disclosure is required in the public interest.

2. *Classification of Advisory Committee Members.*

Congress, by amendment to the Federal Advisory Committee Act or other pertinent statute, should require that each agency determine, when chartering or renewing the charter of an advisory committee, whether its responsibilities are such as to require some or all of its members to be identified as special government employees for purposes of the conflict-of-interest laws. Congress should require the agency to consult with the Office of Government Ethics in making such a determination, and it should direct the agency to be guided by the following considerations --

(a) Ordinarily, where an advisory committee is expected to provide advice of a general nature from which no preference or advantage over others might be gained by a particular person or organization, the members of the committee need not be special government employees.

(b) The members of an advisory committee which renders advice with respect to the agency's disposition of particular matters involving a specific party or parties should be considered special government employees.

(c) The principal consideration in classifying an advisory committee member should be the nature of the committee's function rather than whether or not the member receives compensation.

3. *Coverage.*

This recommendation applies to advisory committees which are established and whose members are appointed or designated by the federal government, and to advisory committees whose operations are funded by the government. It does not apply to privately established advisory committees which are "utilized" by the federal agencies in particular matters.

4. *Technical Amendment.*

Congress should amend 18 U.S.C. 207 (g) to provide that a partner of a special government employee shall not be barred from any representational activity because of that employee's participation in a particular matter where the employee himself would not be barred from such representation by 18 U.S.C. 203 or 205.

Recommendation 89-4

Asylum Adjudication Procedures

Providing asylum to the persecuted is a vital and treasured part of the American humanitarian tradition. It deserves reaffirmation and continued commitment. The asylum process, however, can also become a misused exception in the nation's immigration laws, especially in a time of improved transcontinental travel and communications. Two important public values thus come into conflict in the asylum program. On the one hand stands the promise of refuge to the persecuted; on the other stands the demand for reasonable assurance of national control over the entry of aliens. This tension becomes acute whenever application numbers rise.

In the 1970s, the United States received approximately 2000 applications for asylum each year. By 1988, that number had risen to approximately 60,000 applications. The Immigration and Naturalization Service (INS) projects 100,000 applications in 1989. Government expenditures for coping with the increase have risen rapidly, both for adjudication and for detaining or otherwise arranging to shelter and feed the applicants. But this is necessarily only a stopgap measure. It would be far more cost effective in the long run to devote the resources necessary to improve asylum adjudication procedures.

Although it should be possible to distinguish qualified from unqualified asylum applicants and thereby both honor the humanitarian tradition and avoid misuse of the asylum provision, several factors hinder our ability to do so. First, the "well-founded fear of persecution" standard, upon which asylum is based, is far from self-defining; there is no uniform understanding of its application to particular cases. Second, judgments about the relative risks faced by asylum seekers upon return to their native countries are unavoidably affected by preconceptions about what conditions may be like in those countries. It may also be misleading to posit a sharp distinction between economic migrants and political refugees. Asylum seekers represent a spectrum of motivations, and many leave their home countries because of a mix of political and economic reasons. Third, the facts upon which adjudication must rest are elusive, largely because they turn on conditions in distant countries. Moreover, the individual applicant, often inarticulate and uneasy, may be the only available witness to the specific events that underlie the claim. Therefore, credibility determinations can be crucial, but they are complicated by barriers to effective cross-cultural communication. Improvements in the system must make allowance for all these difficulties.

The central standard for determining whether an applicant will be granted asylum derives from the definition of "refugee" contained in a United Nations (UN) treaty, the 1951 Convention relating to the Status of Refugees, amended by its 1967 Protocol. Under section 208 of the Immigration and Nationality Act (INA), the Attorney General may, in his discretion, provide asylum to applicants who establish that they have a "well-founded fear of persecution" in the home country because of race, religion, nationality, membership in a particular social group, or political opinion. Additionally, section 243(h) of the INA establishes a mandatory country-specific protection which is known as *nonrefoulement*. Section 243(h) provides that the government may not return an alien to a country where his "life or freedom would be threatened" on any of the same five grounds. Under current administrative practice, the most important test has become the "well-founded fear" standard, because people granted asylum status are necessarily shielded against removal from the United States.

Historically, the United States has employed a mix of adversarial and nonadversarial procedures for deciding on asylum and *nonrefoulement* claims. Currently, "walk-in" claims are adjudicated by examiners in the district offices of the INS after an essentially nonadversarial interview. It typically lasts about twenty minutes as the interviewer reviews the application form (I-589) and the applicant's supporting information, and also prepares and issues work authorization papers (provided that the claim is adjudged "nonfrivolous"). The file is then sent to the State Department for its advisory views. The applicant is given fifteen days to respond to any recommendation by the State Department to deny the application. Subsequently, an INS examiner will review the file and issue a decision. This process may take eight months or more. Informal review of district office decisions is provided by the Asylum Policy and Review Unit (APRU), a small office in the Department of Justice created in April 1987.

Denials in the district office are not appealable, but unsuccessful applicants may renew the application in adversarial exclusion or deportation proceedings before an immigration judge, who will consider the matter de novo. These judges are officials in the Executive Office of Immigration Review (EOIR), which is wholly separate from INS but is also a part of the Department of Justice. Aliens who do not file for asylum until such proceedings have started have no access to the district office; they will be heard only by an immigration judge.

The immigration judge's ruling on asylum is appealable to the Board of Immigration Appeals (BIA), which is also located in EOIR. Appeals can easily consume a year or more, largely because of delays in receiving transcripts of immigration court hearings. No further administrative appeals are possible at the instance of the applicant, but on rare occasions, cases are considered by the Attorney General personally upon certification or referral. Judicial review of individual asylum denials almost always occurs as part of the review of exclusion or deportation orders under section 106 of the INA.

Administrative adjudication alone involves five distinct administrative units (the District Office, the State Department, APRU, the Immigration Judges, and BIA), only two of which see the applicant in person. This multiplicity of agencies spreads resources thin, resources that should be concentrated efficiently so as to improve the quality of the procedure and assure that genuine refugees are granted asylum.

Adjudication of an asylum claim through the various administrative and judicial levels requires several months and often consumes years. Such delays increase the attraction for marginal applicants because applicants can enjoy substantial benefits, including work authorization and freedom of movement, throughout the period their claim is pending. Deterrents such as detention or limitations on work authorization could be used to minimize this magnet effect. Those measures, however, carry substantial disadvantages. Primarily, they are indiscriminate in their impact and may fall most heavily on genuine refugees who have already suffered greatly. These measures also entail higher costs for the federal government, especially when asylum claims remain pending for lengthy periods.

The Conference believes that fair but speedy conclusion of adjudication, leading either to a grant of asylum or to an enforceable removal order, is crucial to any healthy asylum adjudication system. This objective can be promoted through attention to two elements. First, delay derives in part from the provision of two separate rounds of de novo consideration of asylum claims. One unified initial asylum proceeding should be established instead. (If the alien has other defenses to deportation or exclusion, those other defenses should continue to be heard by immigration judges in contemporaneous and separate proceedings). Second, additional delay derives from the qualified right to counsel as specified by current statutes and regulations, which provide for counsel in exclusion or deportation cases "at no expense to the government." Because so many applicants are indigent, delays often result from the need to accommodate the schedules of those attorneys who are willing to take the cases on a pro bono basis -- a problem that is compounded when applications increase in a particular geographic location. A healthy system of asylum adjudication must be able to schedule hearings expeditiously, even if pro bono counsel are not immediately available in sufficient numbers. Fairness must be sought, therefore, through hearing procedures, training, and monitoring that assure a special role for the adjudicator in developing a complete record when the applicant is not represented.

The Conference also believes that a healthy asylum adjudication process must foster the greatest possible accuracy as well as public confidence that decisions are rigorous, professional, and unbiased. Reliance on a specialized adjudicative board without routine reference of applications to the State Department would serve these ends and minimize any perception that asylum decisions are influenced by political considerations. Additionally, arrangements must be made to provide the adjudicators with information concerning foreign country conditions that is as accurate and complete as possible, derived from a wide variety of sources, both to help dislodge any preconceptions and to foster systematic expertise for use in developing the record and making the ultimate judgment on the claim.

For several years the Department of Justice has been considering amended asylum regulations that would serve many of these ends. A version proposed in August 1987 [52 Fed. Reg. 32552] would have established a specially-trained corps of adjudicators, responsible to the INS Central Office rather than to the district directors, and it would have eliminated de novo reconsideration of asylum claims by immigration judges. These regulations drew criticism, in part because of concern about the professionalism and independence of the adjudicators, and the Department responded with modified proposed regulations in April 1988 [53 Fed. Reg. 11300] that retained the new corps of adjudicators but also restored the availability of de novo consideration before the immigration judges. Those regulations are still pending in the Attorney General's office and the Department has encouraged this study and analysis.

RECOMMENDATION

The Attorney General should adopt regulations creating a new asylum adjudication process that would eliminate much of the duplication and division of responsibility associated with the current complicated system. Resources should be applied to enhance the professionalism, independence, and expertise of the adjudicators, and to assure fair and expeditious adjudications, so that genuine refugees may be speedily given a secure status and unqualified applicants, absent circumstances which would allow them to remain in this country, may be promptly deported.

I. Creation of a New Asylum Board

The Attorney General should create a new Asylum Board located, for administrative purposes, within the Executive Office of Immigration Review (EOIR) of the Department of Justice and consisting of an adjudication division, an appellate division, and a documentation center. The chairperson of the Asylum Board would be responsible for administrative support and supervision of the operations of all three units.

A. The Adjudication Division

1. **Jurisdiction**. All claims for asylum under section 208 of the Immigration and Nationality Act (INA) or withholding of deportation under INA section 243(h) (hereinafter collectively "asylum" claims) should be heard exclusively by asylum adjudicators in the adjudication division of the Asylum Board.

2. **Nature of the asylum hearing**. Asylum claim proceedings should be recorded.[1] The asylum adjudicator should be responsible for developing a complete record of the specific facts relating to the applicant's claim, including those which might support a grant of asylum and those which might cast doubt on

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[1] The Administrative Conference recommends experimentation with other methods for creating a record that would maintain flexibility but preserve objectivity, professionalism, and fairness to the applicant.

the claim or on the applicant's credibility. Care should be taken to assure the service of skilled interpreters. The adjudicator should be responsible for most of the questioning, with a reasonable and adequate opportunity for additional questioning and entry of relevant information, including the presentation of witnesses, by the applicant and counsel. The Immigration and Naturalization Service (INS) should not be represented as an opposing party in the proceedings.[2]

3. **Representation of applicants**. Applicants should be encouraged to secure counsel (or a qualified nonattorney representative) to develop the initial claim and to provide representation during the asylum proceeding. Although reasonable accommodation should be provided for counsel to be obtained, proceedings should not be unduly delayed, because expeditious initial decisions are essential.

4. **Use of official notice of country conditions**. Asylum adjudicators should develop substantial cumulative expertise regarding country conditions, to be used in developing the record, and should be responsible for posing illuminating questions to the applicant and other witnesses, for evaluating evidence, and for reaching the ultimate determination about likely risks to the applicant upon return to the home country. The accepted standards for official notice, in accordance with the Administrative Procedure Act, should govern use of such information. Ordinarily, these standards will simply require an adequate statement of reasons for accepting or rejecting the asylum claim, reflecting such expertise. In instances when specific and detailed facts developed from the documentation center or other sources (and not from information supplied by the applicant) appear to be crucial, the applicant should be given notice of intent to deny based on such information, along with an opportunity to offer information or argument in rebuttal.

5. **The adjudicators**. Asylum adjudicators should be recruited from among attorneys possessing adjudicative skills and appropriate judgment and

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[2] The Administrative Conference takes no position on the possible application of the Equal Access to Justice Act to asylum proceedings.

temperament, with close attention given to those who are familiar with international relations and refugee affairs and who are sensitive to the difficulties of cross-cultural communication. Adjudicators should receive salary, benefits, and guarantees of adjudicative independence equivalent to those of immigration judges, and they should be assigned no other enforcement or adjudication responsibilities. The adjudicators should be given thorough and ongoing training, especially on techniques for fairly conducting this specialized type of proceeding and on conditions in those countries from which a substantial number of asylum applications is received. If, alternatively, a separate Asylum Board is not created and the adjudication assignment is given to immigration judges, then such judges should be assigned to a separate unit in EOIR.

B. Appellate Division

1. **Composition and functions**. The appellate division of the Asylum Board should consist of the chairperson and two additional members, assisted by staff attorneys and other support personnel. The division's principal responsibilities should be to consider appeals filed by persons denied asylum at the initial stage, in light of the administrative record compiled before an adjudicator, and such other information as the applicant may wish to submit or of which official notice may be taken. The division, however, should also monitor cases, and should have the authority to require certification to it of selected cases, either granting or denying asylum, in order to foster consistency, fairness, and political neutrality. It will thus absorb the principal functions now performed by the Asylum Policy and Review Unit.

2. **Certification or referral to the Attorney General**. The Attorney General should retain the authority to review decisions of the Asylum Board, upon formal certification or referral or *sua sponte*.

3. **Expeditious completion of appeals**. A high priority should be placed on completing all asylum appeals expeditiously, preferably within three months of filing. The Department of Justice should ensure that transcripts, where required, are made from recorded hearings in a timely fashion.

C. Documentation Center

A documentation center, staffed with regional specialists, should maintain current and detailed information on country conditions, from both governmental and nongovernmental sources, periodically compile and publish usable summaries on selected countries, and respond to requests for more specific information received from officials of the Asylum Board. Special effort should be devoted to assuring complete compilations of ongoing reports from established nongovernmental human rights organizations, and to drawing upon information from documentation centers in other countries. Information and procedures developed by other countries can be particularly useful in minimizing start-up costs. The center's collections and publications shall be accessible to the public.

D. Role of the Department of State and the United Nations High Commissioner for Refugees

The Department of Justice should take advantage of resources, assistance, and information available through the State Department and the United Nations High Commissioner for Refugees (UNHCR). In particular, arrangements should be made with both to assist in training adjudicators and to augment information available through the documentation center.

If it so requests, on an across-the-board or country-specific basis, the State Department should receive notice of individual asylum applications, so that it may offer its judgment, in particular, about appropriate responses in sensitive cases, such as those involving foreign government officials.

II. Detention

Where detention of asylum seekers is deemed necessary,[3] the Department should limit it to short-term detention in "asylum processing centers," as recommended by the Select Commission on Immigration and Refugee Policy. Such centers should also keep families together wherever possible, minimize the length of detention, provide assistance in securing representation, and otherwise foster conditions which reflect that the purpose of detention is not punitive.

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[3] The Administrative Conference does not take a position on the suitability of detention in asylum proceedings.

III. **Deportation**

The Department of Justice should ensure that individuals denied asylum are removed promptly if they are otherwise excludable or deportable, subject to any policy decision by the Attorney General to grant extended voluntary departure to nationals of particular countries.

IV. **Judicial Review**

Judicial review of asylum denials should be available as part of the review under section 106 of the INA for orders of deportation or exclusion. Appropriate arrangements therefore should be made to combine, for purposes of judicial review, the record of proceedings before the Asylum Board with that of the regular deportation or exclusion proceedings before the immigration judges and the Board of Immigration Appeals.

Recommendation 89-5

Achieving Judicial Acceptance of Agency Statutory Interpretations

Agencies continually interpret the statutes they administer. Their interpretations are expressed in a great variety of formats -- including, among others, legislative regulations, adjudicatory opinions, court briefs, interpretive rules, policy statements, staff instructions, correspondence, informal advice, press releases, guidance manuals, testimony before Congress, speeches, and internal memoranda. This recommendation addresses the relationship between the procedures used by an agency in interpreting a statute and the role of the courts in statutory interpretation.

Interpretation of a statute presents a question of law, traditionally the province of the judicial branch (see the scope of review provision of the APA, 5 U.S.C. 706). However, for many years courts have accorded respectful attention or even controlling effect to interpretations of statutes made by the agencies that administer them. In some situations, in which the courts reserve the power to arrive independently at their own interpretations, they will give respectful consideration to an agency's construction but may reject it, even if it seems reasonable. In other cases, courts consider themselves bound to accept an agency's interpretation outright, provided only that it is consistent with the statute and is reasonable. The law governing judicial acceptance of agency statutory interpretations is now dominated by *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In that case, one involving legislative rulemaking, the Supreme Court laid out a general framework for reviewing agency interpretations of statutes. First, the court is to determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, the court (like the agency) must give effect to the congressional intent. Where Congress' intent is not clear, however, the court must determine whether the agency's interpretation is based on a reasonable construction of the statute. *Chevron* thus requires a reviewing court to accept an agency interpretation that (a) is not contrary to statute or specific statutory intent and (b) is reasonable.

When an agency issues a legislative rule or interprets its statute in a formal adjudication, its interpretation of the statute it administers is entitled to judicial acceptance under the *Chevron* standard. Similarly, acceptance under the *Chevron* standard is appropriate if the reviewing court finds a congressional delegation of authority to make definitive interpretations in an informal format such as the informal agency staff ruling involved in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980). But agencies rarely possess congressionally delegated authority to make definitive interpretations, carrying the force of law, by informal means. Thus, when an agency states its interpretation of a statute in an informal format, it should understand that courts ordinarily will not be bound to accept such an interpretation.

This is not to say that reviewing courts may ignore an agency interpretation set forth in an informal format. Numerous decisions of courts at all levels indicate that the views of the agencies charged with responsibility for administering a statute are accorded weight and may be highly influential in shaping courts' decisions. In this way courts retain the advantage of administrative agencies' expertise and remain free to adopt agencies' interpretations, even though not required to do so.

Even when interpretations are expressed informally, however, agencies have in some instances successfully asserted that these interpretations should be accepted as definitive by the courts, without consideration of whether the agency possesses the authority to make binding interpretations in the format it has used.

When an agency interprets a statute without using procedures authorized by Congress for the development of definitive statutory interpretations, it should not expect that its interpretation will be entitled to judicial acceptance as definitive. Procedures so authorized by Congress, in almost all cases, will be relatively formal ones that ensure some level of public participation and encourage reasoned and thoughtful decisionmaking by the agencies. However, this recommendation is not intended to discourage agencies and their staffs from using informal means to keep the public apprised of their views on questions of statutory interpretation. It is often useful and appropriate for agencies to provide informal guidance of this type. The agency may reasonably expect that interpretations like these are entitled to such special consideration as their nature and the circumstances of their adoption warrant. But it is important for both agencies and courts to remember that these informal expressions should not be accorded the same weight as definitive agency interpretations.

This recommendation relates solely to the procedures that should be preconditions to agencies' assertion of the *Chevron* standard of review. It thus takes no position concerning any other aspect of the *Chevron* standard.

Accordingly, the Administrative Conference recommends that the following process be observed.

RECOMMENDATION

In developing an interpretation of a statute that is intended to be definitive, an agency should use procedures such as rulemaking, formal adjudication, or other procedures authorized by Congress for, and otherwise appropriate to, the development of definitive agency statutory interpretations.

Recommendation 89-6

Public Financial Disclosure by Executive Branch Officials

Public financial disclosure by federal officials is intended to make it possible to monitor actual or potential conflicts of interest of such officials. This, in turn, may deter public officials from even considering conduct that would present the appearance of a conflict of interest. However, these benefits of public financial disclosure must be balanced against the burdens imposed on the federal officials who are subject to them.

Determining appropriate public financial disclosure requirements requires an assessment and accommodation of three concerns: the relevance of the information to conflicts of interest which might be faced by the individual in his or her official capacity; the practical burden faced by an individual who must assemble and report information accurately (including whether a nominee or employee would reasonably be expected to have at hand the information which he or she is required to report); and the psychological burden imposed on an individual who must make his or her financial status publicly available to others (i.e., whether public disclosure constitutes an excessive invasion of privacy).

The Administrative Conference has studied the Ethics in Government Act's executive branch financial disclosure requirements (codified at 5 U.S.C. 201-209) and in this recommendation urges Congress to make specific changes to those requirements, consistent with an appropriate balance of the benefits and costs of such disclosure.

This recommendation is not made with the intention of generally requiring either more or less disclosure of public officials. Rather, the Conference's goal is to rationalize the Ethics in Government Act's requirements and eliminate those that appear to bear no reasonable relationship to the Act's purposes. On the one hand, the recommendation increases disclosure by reducing the current threshold level for the reporting of a covered individual's liabilities from $10,000 to $1,000, to be consistent with the current threshold level of $1,000 for the reporting of assets (2 b (1)). On the other hand, the recommendation would lessen disclosure by reducing the number of categories of value for the reporting of assets from the current six to two, which the Conference believes is sufficient for conflict-of-interest analysis and the maintenance of public confidence in the integrity of executive branch officials (2 b (2)).

Because the Act's executive branch financial disclosure provisions are so detailed, this recommendation has been organized to clearly distinguish between current provisions that the Conference believes generally further the Act's purposes and, therefore, should be retained, and those provisions that appear unnecessary to achieve the Act's purposes and, therefore, should be eliminated or changed. However, in recommending the retention of particular provisions, the Conference does not mean to imply that such provisions cannot be improved. To the contrary, the Conference urges the Congress to systematically review the coverage and language of all of the Act's public financial disclosure provisions, and to rewrite those that can be made clearer and simpler.

To illustrate, the Conference recommends continuation of the current requirement that nominees for positions covered by the Act report the source of all earned income in excess of $5,000 received by a reporting individual from one source in the two years preceding the year of filing (2 a (2)). However, the current statutory provision (5 U.S.C. 202(a)(6)(B)) requires reporting of such compensation paid "in any of the two calendar years prior to the calendar year during which the individual files his first report . . . ." If strictly applied, a nominee who filed a report in October of 1989 would be required to disclose such compensation for calendar years 1987 and 1988, but not for the period in 1989 prior to his or her entering government service. This theoretical gap in coverage should be closed whether or not in practice it has proven to be a problem.

The same statutory provision exempts from the "over-$5,000 from one source" disclosure requirement the reporting of "any information with respect to any person for whom services were provided by any firm or association of which such individual was a member, partner, or employee unless such individual was *directly involved* in the provision of such services." 5 U.S.C. 202 (a)(6)(B)(emphasis added). In redrafting this provision, Congress should consider either defining the term "directly involved" or delegating to the Office of Government Ethics the responsibility to clarify its meaning by regulation, especially as applied to individuals who provide services to others, such as lawyers. Therefore, although the Conference supports the retention of the substance of this and other of the Act's financial reporting provisions, it is clear that improvements to the language and coverage can be made.

Because of its limited mandate, the Conference takes no position on the public financial disclosure requirements applicable to legislative and judicial branch officials. However, the similarity of those requirements to executive branch requirements suggests the desirability of reviewing and possibly amending legislative and judicial branch requirements as well.

RECOMMENDATION

1. Persons Required To File.

   a. *Positions For Which Coverage Should Be Retained.* Congress should continue to require the following categories of executive branch personnel to make public financial disclosure:

      (1) The President, Vice President, and nominees for and incumbents in positions which require Senate confirmation;

      (2) Full-time officers and employees of the executive branch (including independent agencies) whose positions are classified as GS-16 or above or who are paid at or above the minimum rate of pay fixed for GS-16;

      (3) Each member of a uniformed service whose pay grade is at or in excess of O-7;

      (4) The Postmaster General, Deputy Postmaster General, each Governor of the United States Postal Service, and each Postal Service and Postal Rate Commission officer or employee whose rate of pay equals or exceeds the minimum rate of basic pay for GS-16;

      (5) Each administrative law judge appointed pursuant to 5 U.S.C. 3105; and

      (6) All other employees determined by the Director of the Office of Government Ethics to be in positions

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[1] The Conference is authorized by statute to study and make recommendations relating to administrative procedure used by administrative agencies in carrying out administrative programs, 5 U.S.C. 574.

equal in responsibility to those normally classified at GS-16 or above.

b. *Positions For Which Coverage Should Be Removed.* Congress should amend the Ethics in Government Act to remove the reporting requirement, except as may be required under subsection c below, from the following persons:

(1) Candidates for the offices of President and Vice President who are not receiving federal funds under the federal election laws and who are not government officials otherwise required to report;[2]

(2) Special government employees;[3] and

(3) Designated agency ethics officers whose rate of pay or other responsibilities would not otherwise subject them to the reporting requirement.

c. *Administrative Extensions of Coverage.* Congress should amend the Ethics in Government Act to permit the Director of the Office of Government Ethics to extend the reporting requirement, on a position or categorical basis, to any officer, employee or special government employee of the executive branch not covered by the Act, whose position is determined by the Director to present an unusual opportunity for conflicts of interest.

d. *Administrative Exemption From Coverage.* Congress should amend the Ethics in Government Act to permit the Director of the Office of Government Ethics to exempt from the reporting requirement those positions included in subsection a above whose responsibilities are identified by their agencies and determined by the Director to be unlikely to place their incumbents in situations of conflict of interest.

e. *Review of Coverage Extensions and Exemptions.* Congress should require the Office of Government Ethics annually to review, based on the recommendation of the designated agency ethics officials, all determinations currently in effect under c and d above.

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[2] The Conference recognizes that candidates for these offices are not executive branch officials; nonetheless, this recommendation addresses coverage of candidates because they are included in the current statute setting forth executive personnel financial disclosure requirements.

[3] It is noted that the Administrative Conference has recommended minimal financial disclosure for all members of federal advisory committees, including those members who are special government employees. *See* ACUS Recommendation 89-3, Conflict-of-Interest Requirements for Federal Advisory Committees, 1 CFR 305.89-3.

2. INFORMATION REQUIRED TO BE FILED.

a. *Reporting Requirements That Should Be Retained.* Congress should leave the Ethics in Government Act unchanged in the following respects:

(1) *Reporting by Both Incumbent and Nominated Officials.* Congress should continue to require both incumbent executive branch officers and employees whose positions are covered by the Ethics in Government Act, and nominees for those positions, to disclose publicly the following categories of information:

(a) the identity of any interest in a trade or business or asset held for investment or production of income, if the value of the interest exceeds $1,000;

(b) the identity of all positions held by the reporting individual as an officer, director, trustee, partner, proprietor, representative, employee or consultant of any corporation, company, firm, partnership, or other business enterprise, any non-profit organization, any labor organization, or any educational or other institution other than the United States, but not including positions held in religious, social, fraternal, or political entities, or positions solely of an honorary nature; and

(c) the date, parties to, and terms of any future employment arrangements negotiated by the reporting individual, leaves of absence during the period of federal service, continuing payments from a former employer, or continuing participation in a former employer's welfare or benefit plan.

(2) *Reporting Only by Nominated Officials.* In addition to the information required to be reported by incumbent and nominated executive branch officers and employees under subsection (1) above, Congress should continue to require that nominees for positions covered by the Ethics in Government Act report the source of all earned income in excess of $5,000 received by the reporting individual from one source in the two years preceding the one in which the nominee files, and a brief description of the services for which the compensation was paid. As current law provides, this requirement should not apply to information about

any person for whom services were provided by the firm or association of which the nominee was a member, partner, or employee, unless the nominee was directly involved in the provision of such services.

(3) *Reporting Only by Incumbent Officials.* In addition to the information required to be reported by incumbent and nominated executive branch officers and employees under subsection (1) above, Congress should continue to require covered incumbent executive branch officers and employees to disclose the following categories of information:[4]

(a) the source, type and amount of non-governmental earned income received by the reporting individual, including honoraria, which in the aggregate exceeded $100; and

(b) the date and a brief description of each purchase, sale or exchange of real property, stocks, bonds, commodities futures or other property with a value over $1,000, *except* (i) transactions between the reporting individual and a spouse or dependent children, (ii) transactions involving a personal residence of the reporting individual or the individual's spouse, and (iii) transactions involving an investment in the nature of a cash equivalent (*e.g.*, a money market fund, certificate of deposit, or personal bank account.)

(4) *Interests of Spouses and Dependent Children.* The present statutory provisions on reporting of the interests of spouses and dependent children of the reporting official should be retained.

b. Reporting Requirements That Should be Changed. Congress should amend the Ethics in Government Act to change the reporting requirements in the following ways:

(1) *Liabilities.* The present requirement of reporting the identity of liabilities in excess of $10,000 owed by the reporting individual should be changed to a requirement of reporting liabilities in excess of $1,000, the same value which the statute now uses for reporting of assets. As present law provides, the reporting requirement should not extend to the

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[4] Under current practice individuals who joined the government in the preceding calendar year are only required to report this information for their period of government service and not before.

individual's home mortgage, loans for the purchase of personal property which are secured by the property purchased and which do not exceed the value of the security, sums owed to a relative, and revolving charge accounts with a balance less than a specified amount at the end of the reporting period (currently $10,000).

(2) *Categories of Value.* The present requirement that assets, liabilities, and transactions in assets above the $1,000 threshold be reported in numerous categories of value should be eliminated. However, in order to distinguish large interests from those of lesser significance, the reporting individual should be required to state whether each particular asset, liability or transaction was in excess of a specified higher amount (*e.g.*, $50,000 or $100,000 each).

(3) *Sources of Earned Income Prior to Government Service.* The requirement that all nominees for covered positions report the source, type and amount of non-government earned income which they received in the year prior to entering government service should be eliminated, except for amounts in excess of $5,000 received from one source (*see* 2 a (2) above).

(4) *Income from Assets Otherwise Reported.* The requirement that both incumbents and nominated officials report income in excess of $100 from each of their investments should be eliminated because the assets themselves are already reported.

(5) *Reimbursements and Gifts.*

(i) *Reporting Period.* The date after which all covered reimbursements and gifts should be required to be reported should be the date on which the official is nominated for or appointed to the position covered by the Ethics in Government Act, not the date the official takes office.

(ii) *Reimbursement and Gifts of Travel or Entertainment.* The threshold amount for reporting reimbursements and gifts of transportation, lodging, food or entertainment, other than personal hospitality from an individual, received by the reporting individual from any source other than a relative during the reporting period should be changed from $250 per year to a per event amount (*e.g.*, $100 or $150) to avoid reporting de minimis information. The statute should be amended further to require, in addition to the source and a brief description, the reporting of the value or amount of such reimbursements or gifts in broad categories (*e.g.*, under $1,000; $1,000 to $10,000; over $10,000) in accordance with regulations issued by the Office of Government Ethics.

(iii) *All Other Covered Gifts.* The requirement of reporting all gifts to the reporting individual, other than gifts of transportation, lodging, food or entertainment, which aggregated more than $100 in value over the reporting period, excluding gifts from relatives of the reporting individual, and not aggregating gifts of $35 or less in calculating the $100, should be retained. However, the statute should be amended to require, in addition to the source and a brief description, the reporting of the value or amount of such gifts in broad categories (*e.g.*, under $1,000; $1,000 to $10,000; over $10,000) in accordance with regulations issued by the Office of Government Ethics.

Recommendation 89-7

Federal Regulation of Biotechnology

New biotechnology techniques promise great benefits in fields such as medicine, agriculture, and manufacturing. However, these new techniques, which involve alteration of the genetic structure of an organism, have raised concerns that some new organisms or products may be dangerous to individuals or detrimental to the environment. This recommendation addresses coordination of federal regulation in this area and the procedures agencies use to regulate biotechnology development, testing and use.

Genetically-engineered organisms are regulated under a variety of statutes enacted to prevent or reduce society's exposure to unsafe or harmful products or substances. The agencies with such statutory authorities currently share responsibilities for regulation of biotechnology in accordance with policy statements issued in 1986 by the agencies and by the Director of the Office of Science and Technology Policy (who serves as the President's Science Adviser).[1] In its policy statement, the Office of Science and Technology Policy (OSTP) attempted to clarify the responsibility of each agency where more than one agency shared jurisdiction to regulate biotechnology areas.

The Conference recommends a continuation of interagency coordination under the auspices of the OSTP. Experience does not currently indicate that new legislation is needed for effective interagency coordination of biotechnology regulation. On the other hand, the Conference believes that both the President and the Congress should monitor closely the coordination process because of the importance of this area to the nation's economic and social well-being.

The Conference also recommends that the President and the Congress, through the OSTP and the Office of Technology Assessment (OTA), survey biotechnology developments and agency regulation of biotechnology under existing statutes to determine whether current law and regulation provide adequate authority to protect public and private interests or whether in particular instances current regulation is unnecessary. The survey should identify whether nonregulation of any particular area reflects an agency decision not to use its authority to regulate or an absence of regulatory authority.

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[1] OSTP, Coordinated Framework for Regulation of Biotechnology; Announcement of Policy and Notice for Public Comment, 51 F.R. 23302 (1986).

The Conference also urges changes in the coordination role for biotechnology regulation performed by the President's Office of Science and Technology Policy. Most importantly, the Conference urges the President to make the work of the Office's Biotechnology Science Coordinating Committee (BSCC) a high priority. A revitalized BSCC can help agencies coordinate their activities concerning biotechnology development, regulation, funding, and biosafety research. To fulfill this mandate, the Conference believes the BSCC's role should emphasize fact-finding, reporting, and serving as a clearinghouse for information relating to biotechnology.

The Conference recommends that agencies engaged in biotechnology regulation articulate their policies through generic rules and policy statements to the extent possible. Since public acceptance of agency decisions is especially important in this area and because of the novelty and uncertainty of the risks associated with biotechnology, the Conference encourages agencies to adopt appropriate procedures to allow public participation. Agencies are also encouraged to seek ways to make biosafety information available to the public to the maximum extent consistent with protection of the proprietary interests of submitters of confidential business information.

RECOMMENDATION

1. *Biotechnology Regulatory Structure*

(a) Interagency coordination is critically needed to mitigate problems caused by concurrent regulation of biotechnology by two or more agencies. The Office of Science and Technology Policy's Biotechnology Science Coordinating Committee (BSCC) should have primary responsibility for identifying issues, exchanging information and preparing reports concerning issues common to several agencies. Responsibility for establishing uniform government policies should be retained by the Office of

Management and Budget working in coordination with the BSCC.

(b) The President and Congress should survey biotechnology developments and agency regulation of biotechnology under existing statutes to consider whether and in what respects current regulation of biotechnology is inadequate or excessive. To facilitate this, the President's Office of Science and Technology Policy (OSTP) and Congress' Office of Technology Assessment (OTA) should, jointly or separately, identify all areas of biotechnology activity and determine the extent to which they are being regulated. OSTP and OTA should assess whether or not additional or diminished regulatory authority is desirable in such areas and furnish their findings and recommendations to the President and Congress.

2. *Regulatory Coordination*

(a) The President should make coordination of the government's activities relating to biotechnology a high priority. This should include:

(1) monitoring the effectiveness of interagency coordination;

(2) directing the Science Adviser to enlarge the membership of the BSCC to include all federal agencies that have substantial responsibilities for biotechnology research, development, or regulatory policy; and

(3) directing the Science Adviser to invite representatives of other agencies to participate in the BSCC's activities, as appropriate, such as when their regulatory or other official responsibilities may be affected.

(b) The BSCC should have a broad subject-matter mandate, including issues of biotechnology development, regulation, funding, and biosafety research. The Committee's role should emphasize fact-finding, reporting, and serving as a clearinghouse for information relating to biotechnology.

(c) The Science Adviser should establish a policy for the BSCC that will foster opening its proceedings to the public.

(1) Meetings of the BSCC should be open to the public unless they involve confidential information.

(2) Members of the public should be allowed to provide comments to the BSCC either orally or in writing.

(3) The BSCC may invite advice from experts outside the government.

(4) The BSCC should keep minutes or other records of its proceedings, including the reasons for closing any meetings.

3. *Regulatory Procedures*

(a) Agencies should, where appropriate, seek opportunities to promulgate generic biotechnology rules to address recurring regulatory issues.

(b) Agencies should consider the adoption of rules or policy statements to enunciate the principles or criteria they will include in their risk assessment and management decisions. When adopting policy statements, agencies should follow the public participation procedures set forth in Conference Recommendation 76-5.[2]

(c) Agencies should consider adopting appropriate procedures to allow public participation and other forms of input when making regulatory determinations concerning biotechnology. Such procedures might include:

(1) giving notice to the public with an invitation to submit comments concerning the determination;

(2) providing additional notice of pending regulatory actions to persons who live near sites where proposed activities would take place;

(3) holding informal public hearings to supplement written procedures; or

(4) utilizing advisory committees under the Federal Advisory Committee Act.[3]

(d) Agencies should seek ways to meet the public's need for biosafety information about substances or organisms produced through biotechnology, without divulging confidential business information.[4] Such steps might include:

(1) requesting submitters of confidential business information to focus their claims for confidentiality as much as possible;

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[2] ACUS Recommendation 76-5, Interpretive Rules of General Applicability and Statements of General Policy, 1 C.F.R. 305.76-5 (1989).

[3] *See* ACUS Recommendation, 82-5, Federal Regulation of Cancer-Causing Chemicals, Part IV, 1 C.F.R. 305.82-5 (1989).

[4] *See* ACUS Recommendation 82-1, Exemption (b)(4) of the Freedom of Information Act, 1 C.F.R. 305.82-1 (1988).

(2) requiring submitters of data that include confidential business information to identify those portions that are claimed to be confidential and to substantiate their claims at the time of submission; and

(3) summarizing or aggregating confidential data in a manner that does not compromise confidentiality.

Recommendation 89-8

Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions

This recommendation examines the obligation of agencies to index and make their adjudicatory decisions available to the public.

The Freedom of Information Act (FOIA) imposes numerous affirmative disclosure obligations on agencies. Under 5 U.S.C. 552(a)(2), each agency, in accordance with published rules, is required to make final adjudicatory decisions and orders[1] available for public inspection and copying unless the materials are promptly published and copies are offered for sale. In addition, each agency shall maintain and make available for public inspection and copying current indexes that provide identifying information for the public as to any matter issued, adopted, or promulgated. FOIA further mandates that each agency shall promptly publish, quarterly or more frequently, and distribute copies of each index unless it determines, by order published in the Federal Register, that such publication is unnecessary and impracticable.

Many agencies do, in fact, index and publish or otherwise make available to the public their adjudicatory decisions, as required under FOIA (e.g., the National Labor Relations Board, the Merit Systems Protection Board, the Interstate Commerce Commission, the Securities and Exchange Commission). This recommendation, then, is addressed to those agencies which either entirely fail to index, publish or make their decisions available to the public or fail to do so adequately, whether or not they use adjudicatory precedent to pronounce and develop agency policy.

Debate has surrounded consideration of an appropriate test for determining which types of adjudicatory decisions are included in this affirmative disclosure obligation. The Attorney General initially expressed the opinion that FOIA requires that agencies index only those decisions cited by an agency or relied upon as precedent. This limitation, in the view of the Attorney General, was derived from both the enforcement provision in the statute, which precludes the agency from giving precedential effect to matters not indexed, and the legislative history of the statute, which indicates that the disclosure provision was intended to make available documents having precedential significance. The Attorney General also was influenced by the impracticality of indexing all agency decisions.

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[1] This subsection also covers agency statements of policy and interpretations, as well as administrative staff manuals and instructions to staff that affect a member of the public. The Conference has already recommended that agency policies that affect the public should be articulated and made known to the public to the greatest extent feasible, ACUS Recommendation 71-3 "Articulation of Agency Policies." *See also* ACUS Recommendation 70-3, "SEC No-Action Letters Under Section 4 of the Securities Act of 1933."

Application of the affirmative disclosure requirements, beyond simply precedential decisions, however, offers several advantages. First, if agencies index all significant decisions, and not just those decisions deemed to be precedential, agencies would be less inclined to be restrictive or one-sided in the selection of cases to be accorded precedential effect. Second, private parties affected by agency action would be in a better position to learn of and influence agency policy. Third, a broader application of affirmative disclosure requirements would implement the underlying aim of the FOIA indexing requirements which is to afford citizens the essential information needed to deal effectively and knowledgeably with federal agencies and to guard against the development of secret law. Lastly, a current index of final decisions may assist agencies in developing standards and policies with respect to general issues and recurring questions.

The few cases dealing with the FOIA affirmative disclosure obligations have generally read the precedential test broadly. They require disclosure not only of decisions that an agency considers to be binding but also all decisions that an agency retains for general reference and research. The recommended approach to the indexing and public availability of final decisions focuses less on the binding nature of the precedent and more on the value that decisions can have to inform and assist the public.

RECOMMENDATION

1. Indexing of Agency Decisions

Agencies that do not already do so should compile a subject-matter index of their adjudicatory decisions so as to afford citizens information useful in dealing with the agencies and to assist the development of agency standards and policies on general issues and recurring questions.[2]

In meeting FOIA indexing requirements, agencies should ensure that a subject-matter index is made of their decisions and that the index includes all significant decisions, whether or not the decisions are designated as precedential.

2. Level and Scope of Decisions Indexed

The index should cover the adjudicatory decisions of the agency's highest level tribunal. The agency should also consider whether to index significant lower level decisions that have become final. The adjudicatory decisions intended to be covered by this recommendation are those made with an accompanying written opinion or rationale in contested cases after an opportunity for a hearing at some stage of the proceeding.

3. Index Contents

Agency indexes should be designed for effective and efficient use. These indexes should contain sufficient information on each indexed decision to identify the major issues decided and the location of the case file. Agencies should adopt one of the following practices in indexing their adjudicatory decisions:

A. *Universal Index.* Index all final decisions; or

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[2] In programs where the agency has established a policy that none of its decisions have precedential effect, the Conference urges that the agency re-examine the feasibility of creating a system that accords certain decisions precedential value to provide guidance about the factors that influence their decisions and to ensure better development of agency policy and standards. *See* ACUS Recommendation 87-7, "A New Role for the Social Security Appeals Council," 1 C.F.R. 305.87-7. *See also* ACUS Recommendation 71-5, "Procedures of the Immigration and Naturalization Service In Respect to Change-of-Status Applications."

B. *Selective Index.* Where the volume of decisions makes a universal index impracticable or uninformative, selectively index final decisions omitting those decisions that are repetitive. The selective index should include all significant decisions. Decisions may be significant because they are deemed by the agency to be precedential or otherwise establish a principle to govern recurring cases with similar facts, develop agency policy and exceptions to the policy in areas where the law is unsettled, deal with important emerging trends, or provide examples of the appropriate resolution of major types of cases not otherwise indexed.

4. Public Notice of the Index

Agency indexes should be fully disclosed and readily available. Appropriate notice of the existence of unpublished decisions should also be given in both the agency's FOIA regulations and the procedural or substantive regulations governing the specific program.

5. Computer Technology

Agencies should explore the use of computer technology in order to promote accessibility and reduce costs of indexing.

Recommendation 89-9

Processing and Review of Visa Denials

United States consulates around the world complete the processing of some nine million applications for immigrant and nonimmigrant visas each year. Approximately ninety percent are granted; ten percent are denied. Under current practice, the only review of a consular official's denial of a visa may be by a more senior officer in the consulate, or, on points of law, by the Visa Office in the State Department. The Immigration and Nationality Act has been read to preclude administrative review, and the courts, with a few exceptions, have declined to review visa denials.

Immigrant visas are available to persons with close family relationships to U.S. citizens and residents, or with particular abilities or skills that are needed but not otherwise available in the United States. Nonimmigrant visas are available in a long list of classes, ranging from tourists to students to certain types of business personnel to diplomats.

Whatever the visa category or class, there clearly are important interests at stake. These interests are not just those of the applicants themselves, but also of citizens and residents of the United States who are sponsoring the applicant or have some other interest in the applicant's presence in the United States. These interests warrant a close look at whether initial decisions in this important program of mass adjudication should be more fully reviewable than at present.

Federal law and State Department regulations give consular officers substantial discretion in adjudicating visa applications. For example, consular officials exercise absolute discretion in determining whether an applicant may be represented by an attorney or other qualified representative at the visa application interview. Furthermore, although current Department regulations, at 22 C.F.R. 41.121(c), require that a denial of a visa application be reviewed by a more senior officer, the high volume of applications at some posts has resulted in only a random sample of denials being reviewed. Review by a senior official may also be a problem in single-officer posts.

Consular posts send a few hundred cases a year presenting significant legal issues to the Visa Office of the State

Department for an advisory opinion that is binding only with respect to legal issues. The applicant typically has no notice of this proceeding. Such review affects the results in only a small number of cases, since most visa denials are based on a factual determination.

Current law has been read by some to limit both administrative and judicial review. Section 104(a) of the INA, 8 U.S.C. 1104(a), excepts the Secretary of State from the administration or enforcement of "those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas." This language has been considered by some to preclude the establishment of a more formal review mechanism within the State Department. Further, courts have generally limited the extent of available judicial review.

The Conference believes that it is important that there be at least some level of review of consular discretion to deny or grant visas. The availability of such review would not only encourage consistency and care in the initial adjudication, but would serve interests of fairness and legitimacy. On the other hand, a review scheme in this area can be crafted in a fashion that keeps procedure to a minimum, takes account of the extremely high volume of visa applications, and avoids over-judicialization of the process.

The Recommendation reflects a two-pronged approach to administrative review of visa denials, aimed both at improving the review at the consular level and at considering the creation of a level of centralized administrative review. The suggestions directed at the consular offices are intended to encourage quick, consistently applied, and cost-effective review that would resolve many of the issues on which review might be requested. The Recommendation also asks the State Department to study the issues, and develop and submit to Congress a proposed process for administrative review of consular actions. The Conference recognizes that there are currently competing priorities for resources that might be required by implementation of this Recommendation, but believes that these proposals should be implemented as quickly as is feasible under the circumstances.

RECOMMENDATION

1. The State Department should adopt a regulation ensuring that applicants may be accompanied by an attorney or other

authorized representative during the course of the visa application interview process. To the extent practicable, the State Department should take steps to reply promptly to communications from applicants or authorized representatives and to ensure that facilities are available to enable applicants to meet with their representatives during the application interview process.

2. The State Department should require consular officers to provide brief but explicit written statements of the factual and legal bases and reasons for denying a visa application, except where reasons of national security or potential adverse effects on foreign policy dictate otherwise.

3. The State Department should modify its regulations to allow Visa Office advisory opinions to be made available to applicants and their authorized representatives except where national security or potential adverse effects on foreign policy dictate otherwise.

4. The State Department should either comply with its regulation found at 22 C.F.R. 41.121(c) requiring review within a consulate of each denial of a visa application, or examine alternative systems to review visa denials at consular posts. In such a study, the State Department should keep in mind the goal of ensuring consistency in visa adjudications and consider possible alternatives to address exigencies created by busy consular posts, for example, by reviewing random samples of visa denials, or selecting for review certain types of denials.

5. The State Department should, after appropriate study, develop and submit for Congressional review a proposed process for administrative review of consular visa actions.[1]

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[1] If it is thought that current law precludes such a State Department study, Congress should authorize the State Department to undertake the study.

Recommendation 89-10

Improved Use of Medical Personnel in Social Security Disability Determinations

The Social Security Administration annually processes more than 1.5 million requests for Disability Insurance Benefits and Supplemental Security Income requiring a determination whether the claimant is disabled. The Administrative Conference has addressed various aspects of the Social Security Administration's administrative procedures in earlier recommendations.[1] This recommendation focuses more specifically on the appropriate use of medical personnel in making disability determinations.

The Social Security Administration (SSA) uses medical personnel currently in two ways. First, initial and reconsideration determinations are made for SSA by federally funded state agencies that use teams composed of one lay disability examiner and one medical doctor or psychologist.[2] Second, medical sources are used to provide evidence of disability in individual cases and to explain or elaborate upon medical evidence obtained from other sources. Medical sources provide evidence relating to individual claims to state agencies at the initial decision and reconsideration levels, to administrative law judges at the hearing level, and to the Appeals Council. Requests can be made to the claimant's treating physician or to an independent physician who is asked to examine the claimant and report on his or her findings. Doctors are asked by some administrative law judges to explain or elaborate upon existing medical evidence; other administrative law judges and most state agency personnel do not use independent medical doctors for these purposes. Medical personnel are involved in the disability determination process for other federal disability programs as well. Although the extent to which they are used varies from program to program, programs typically concentrate the use of medical personnel at the initial decision stage, as does the Social Security Administration.[3]

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[1] *See* Recommendations 78-2 (ALJ hearing stage), 87-6 (state level determinations), 87-7 (Appeals Council).

[2] For cases involving mental impairments, Social Security regulations provide that either psychologists or psychiatrists may assist in determining disability. Accordingly, references to the terms "medical sources," "physicians," and "doctors" in these recommendations are intended to include psychologists used in those cases.

There is no doubt that medical personnel can offer valuable assistance in making disability determinations called for by the Social Security Act. Notwithstanding the mixed medical and legal content of the Social Security Act's disability standards, most disability determinations require the resolution of medical issues in one form or another. At the same time, it must be recognized that doctors cannot simply apply their general medical expertise to the work of determining disability under a complex and multi-faceted statutory disability standard. Doctors are accustomed to evaluating a person's limitations in the context of treatment; they are oriented professionally to identify the cause of and resolve limitations, rather than to identify limitations and then measure them against stated requirements for receipt of benefits. These recommendations are intended to help reconcile the needs of the Social Security Administration disability determination process for medical expertise and the ability of the medical profession to meet those needs.

Medical personnel perform three main functions in current practice. First, they assist in developing the medical records on which disability decisions are based. Second, they provide medical evidence for the record, including medical findings and opinions relating to an individual claimant's impairments and explanations of other medical evidence already in the record. Third, they participate in making disability decisions at the initial and reconsideration levels based on the record.

Each of these functions suggests models for using medical decisionmakers in Social Security disability determinations. The first model would increase the responsibility of medical personnel for compiling all relevant medical evidence. Medical personnel would concentrate on evaluating the adequacy of the record and following up with requests for clarification and additional information from treating and consulting medical sources. Medical personnel would also be given specific responsibility for assuring that all medical evidence in the record is clear and understandable to both medical and non-medical decisionmakers. The second model would improve the use of doctors as sources for supplying medical data and opinions on which disability decisions can be based. This model also supports the use of medical personnel to evaluate and resolve certain specified medical issues relevant to a claim if, in a particular case, there are medical issues that can be identified as appropriate for separate decision. The third model would make more effective use of medical personnel in a decisionmaking role. This model would concentrate medical resources at the initial decision level, where a doctor would share the responsibility for decisionmaking with a non-medical disability examiner. The doctor member of the team would be given special responsibility for certain tasks, and would undertake a full and independent review of the entire record in each case. The expectation is that through open exchange of information between the two decisionmakers and a reasonable allocation of responsibility based on each member's expertise, most disability determinations will be made by consensus. If conflicts arise on medical issues, separate medical personnel would be given the authority to resolve those conflicts.

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[3] While the Conference has examined the other federal disability programs and believes that these recommendations hold valuable lessons for the agencies administering those programs, these recommendations are addressed solely to the Social Security Administration.

The following recommendations would implement the important provisions of each of these models. Implementing these recommendations would require greater expenditures for medical personnel and related support at the state agencies. However, additional costs should be offset by savings resulting from elimination of the reconsideration level and reduced numbers of administrative and federal court appeals.

RECOMMENDATION

A. Improvements at the Initial Decision Level

The Social Security Administration (SSA) should enhance the decisionmaking role of medical personnel at the initial decision level. This can be accomplished by improving upon the current practice of using two-member teams--consisting of a medical member who is a licensed physician or psychologist and a non-medical member who is a disability examiner--to determine disability, as follows:

1. *Responsibility for developing medical evidence.* SSA should ensure that the medical member of the team is given

primary responsibility for developing the medical evidence[4] in the record.

(a) Staff and resources should be allocated so as to assure that a complete record of all evidence relevant to a disability claim is obtained before an initial decision is made on the claim.

(b) Specially trained support staff, including nurses and non-medical personnel, should be made available to assist the medical member in developing the medical evidence.

(c) The medical member should, whenever possible, be assigned direct responsibility for evaluating the adequacy of reports from physicians and for following up with requests for clarification or additional information from these sources.

2. *Identifying and deciding discrete medical issues.* SSA should develop a list of discrete issues raised by the applicable disability standards that may arise in individual claims and that are appropriate for decision by medical staff. The medical member of the team assigned to a claim should be made responsible for identifying any such discrete issues raised in the claim, developing all evidence relevant to the issue, and reaching a decision on that issue.

3. *Resolving medical conflicts.* SSA should ensure that medical personnel are used to resolve any conflicts on medical issues that arise in the course of team evaluations of disability at the initial decision level.

(a) Senior medical staff should be given the authority to review claims where the team members are unable to agree and to recommend further action, including the development of additional medical evidence, to resolve the conflict.

(b) If the conflict persists, the state agency's medical personnel should assume primary responsibility for evaluating the record with respect to the medical issues and for making a determination based on that record.

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[4] "Medical evidence" includes (1) medical findings and opinions relating to an individual claimant's impairments, (2) other evidence, including subjective symptoms, that is relevant to determining the existence or severity of the claimant's condition, and (3) explanations of other medical evidence already in the record. The recommendations' focus on development of medical evidence is not intended to minimize the importance of the development of other evidence, including vocational evidence.

(c) As part of this process, independent medical experts, or panels of experts, should be identified and retained for use as examining and non-examining consultants, as appropriate.

4. *Notice of deficiencies in medical evidence.* SSA should require that claimants be informed specifically of any deficiencies in the medical evidence that could lead to an adverse determination before the initial decision is made.

(a) This notice should be prepared by the medical member of the team, should clearly explain any deficiency in the medical evidence, and should encourage the claimant to provide additional information and explanation, as needed. This notice should also state that the agency will assist claimants in obtaining this information when they are unable to do so on their own due to financial or other constraints.

(b) As part of this process, either the claimant or the medical member should have the authority to initiate a face-to-face interview.

5. *Ensuring quality of evidence.* SSA should take steps to improve the quality of evidence provided by medical sources for disability adjudications.

(a) Guidelines should be established that identify priorities for the use of treating physicians, examining physicians and non-examining physicians, including specialists, for these purposes.

(b) Selection and evaluation of physicians asked to provide medical information should be performed by medical personnel independent from the agency staff responsible for making disability decisions and should be supported by a system for quality control covering both the selection of physicians and the reports submitted.

(c) Physicians asked to provide medical information should be adequately compensated and should be provided with instructions as to applicable agency standards.

(d) Medical personnel should be able, when appropriate, to consult with specialists before ordering examinations or tests.

(e) All contacts with medical sources relating to the determination of disability for a particular claim should be documented routinely in writing and included in the record. SSA should ensure that claimants are provided a copy of any reports prior to issuance of the decision and accorded an opportunity to object and rebut appropriately.

6. *Training and supervision of medical personnel.* SSA should ensure that all medical personnel are trained fully on legal and program issues and work under the supervision of the chief medical officer in the state agency. SSA should also ensure that medical staff act in accordance with the rules established by the Social Security Act and relevant federal court decisions, including the requirement to obtain and give appropriate weight to the opinions of claimants' treating physicians, in performing the functions described in paragraphs 2, 3(b), and 5(a).

B. Reconsideration

7. *Elimination of Reconsideration.* SSA should seek to concentrate the efforts of the disability determination team on a single initial decision process, as outlined in these recommendations. Together with implementation of these recommendations, the separate reconsideration stage should be eliminated.

C. Appeal Level

8. *ALJ use of medical experts.* SSA should encourage its administrative law judges to call on an independent medical expert in appropriate cases to assess the need for any additional medical evidence and to explain or clarify medical evidence in the record.[5] SSA should make clear by regulation that a medical expert's evidence can be presented orally or in writing. The regulations should also provide that claimants are notified of the inclusion of an expert's report in the record and should assure that claimants' rights to object to the inclusion of the report, submit rebuttal evidence, and cross-examine the expert are not abridged. The regulations should also provide that all information and opinions provided by medical experts must be included in the record.

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[5] SSA should also ensure that its ALJs receive appropriate training on medical issues relevant to their decisional responsibilies.

Statement 14

Mass Decisionmaking Programs: The Alien Legalization Experience.

The Alien Legalization Program, authorized under the Immigration Reform and Control Act of 1986, created a program to allow certain aliens present illegally in the United States to convert their status to that of a legal resident. The program is administered by the Immigration and Naturalization Service and has a short and defined lifetime, which is heading toward completion. The legalization program contains two separate pieces: the "section 245A" program, for aliens who have been in the country since January 1, 1982; and the "special agricultural worker" program, for alien farmworkers who worked in specified agricultural employment for at least 90 days during a specified period. The application period for the "section 245A" program ran from May 5, 1987 through May 4, 1988. The application for the SAW program ran from June 1, 1987 through November 30, 1988. Although the INS has acted on most of the cases, some are likely to remain pending for months. Moreover, as described below, the second phase of the process is still ongoing.

The Administrative Conference has studied the INS's processing of alien legalization applications from the standpoints of what improvements can be made by the INS in the remaining phases of the legalization program itself, and what lessons can be applied in future mass decisionmaking programs by the INS or by other agencies. This Statement does not address the merits of litigation over the regulatory ground rules of the program, but only the procedures for handling the applications themselves.

DESCRIPTION OF THE PROCESS

The Alien Legalization Program has been administered by the INS using a framework of local Legalization Offices (LOs) (107 of them across the country) and four Regional Processing Facilities (RPFs) to process the more than three million applications for legalization that were received. Applications are filed with the LOs, where interviews are conducted and recommendations for action are made. The files are then sent to a central processing center in London, Kentucky, following which they are forwarded to one of the four RPFs across the country. The RPFs make the determinations on the applications, based on the file material. Appeal of a denial of legalization status is available to the Legalization Appeals Unit (LAU) in Washington, D.C., and is based on the "administrative record." 8 U.S.C. 1255a(f)(3)(B).

The legalization process has two phases. The first phase is to determine whether an applicant qualifies for legalization. The second phase, which applies only to qualified section 245A applicants, involves a determination whether they qualify for permanent resident alien status. (In the agricultural program, permanent resident alien status is automatic.) The initial application period for both programs is now closed, and the INS has processed a large number, although not all, of those applications.

The "remote decisionmaking" system employed in the Alien Legalization Program involves decisionmaking at the four RPFs rather than at local levels. This system has provided more consistency in decisions than other, more decentralized systems within the INS. Having the determination made by a person removed from the individual who actually interviewed the applicant reduced the potential subjectivity of decisionmakers. Because interviewers at the local levels knew that their files would be examined in virtually every case, the quality of work in the files has been relatively high. There are also suggestions that the system of regional facilities promoted cost-efficiency.

The RPF remote decisionmaking system, however, has not been without problems. The elimination of direct contact between the decisionmaker and the applicant, which helps eliminate bias or prejudice, also eliminates the opportunity for first-hand credibility determinations by the ultimate decisionmaker. The RPFs also have been very isolated from the public, making it difficult for applicants or their representatives to acquire information about the status of cases, among other things. The RPFs have had only limited access to legal advice from INS attorneys, requiring them in at least one facility to seek advice from the LAU, which is the appellate unit that reviews appeals of their decisions. There have been some difficulties relating to the interaction between the LOs and the RPFs, and relating to the provision of adequate notice to applicants at different stages of the program. There also has been reported an unexpectedly high incidence of fraudulent applications, particularly in the agricultural worker program, which the RPFs were not equipped to handle.

Overall, however, the system for deciding legalization applications appears to be working fairly well. The results among the regions have been quite consistent so far. The INS has been able to process large numbers of the applications, particularly in the first phase of the section 245A program. Moreover, the INS has recognized many of the problems, and taken steps to address them.

From the INS experience, it is possible to derive some lessons, not only for other INS programs in the future, but for other agencies that may consider using a system of remote decisionmaking for a large volume of cases. There are also a number of lessons that can be drawn about the Alien Legalization Program in particular. While that program is nearing completion, to the extent that these comments refer to elements of the program that are ongoing, the Conference encourages the INS to implement the suggestions to the extent possible and to the extent that it has not already done so.

CONCLUSIONS

A. The Conference encourages agencies, including the INS, to consider using remote decisionmaking where there is a large volume of cases to be decided on the basis of objectively verifiable information within a written file, particularly where bias, prejudice or other subjectivity may be a significant problem. This system appears to promote consistency among decisionmakers, perhaps because of the more centralized nature of the process, and the fact that it is easier for a small group of managers to confer on a regular basis about the decisionmaking process. Agencies should, in implementing such a system, consider the following suggestions:

1. In a remote decisionmaking system in which a file prepared on a local level will be the basis for decisionmaking, there must be clear guidelines as to what are the necessary contents of the file, and the use of standardized forms and checklists is encouraged.
2. Where the local office is making a preliminary recommendation to the remote decisionmaking center, the local office should be instructed to provide an explanation for its recommended decision that is sufficient to provide the remote center with the maximum benefit of the local office's information and interaction with the applicant or other interested person whose case is being determined (hereinafter "applicant"). Appropriate forms or formats (e.g., computer entry) should be designed to ensure that the necessary information is transmitted in a uniform manner to assist in review and retrieval.
3. It is important that adequate information be available to the applicants and their representatives concerning their cases. To facilitate this, case tracking systems capable of responding to inquiries should be developed. Applicants should be clearly informed of the process relating to their cases, and be given adequate notice of each step that requires or provides an opportunity for action or participation on their part.
4. To avoid the appearance or actuality of conflict, it is important that the remote decisionmaking centers have adequate access to legal advice relating to the merits of matters before them from agency legal staff other than from the appellate unit, if any, that reviews appeals of their decisions.
5. Ensuring input from local personnel on credibility issues is of particular importance. It may be useful to consider ways of videotaping or otherwise recording interviews where the applicant's credibility is at issue.
6. Where helpful, the decisionmakers at remote decisionmaking centers should be provided the opportunity to work for a short period of time at a local office, giving them first-hand experience in interviewing applicants, in order to provide them a better sense of the implications of the information they receive.
7. The remote decisionmaking centers' managers should consult with each other regularly on substantive

and procedural matters, in order to ensure that their actions are consistent.

8. It is important that the system be able to provide new or amended instructions to the local offices quickly, so that consistency can be maintained and the benefits of experience transmitted.

B. With respect to the Alien Legalization Program specifically, the Conference encourages the INS to implement or continue to implement the following suggestions to the extent that they refer to elements of the program that are ongoing:

1. Action should be taken to ensure that information concerning individual applications for legalization is readily available to the applicant or his or her representative. INS should:

   a) Establish a method of tracking cases that would enable applicants or their representatives to obtain information expeditiously concerning the status of their cases;

   b) Ensure that applicants are clearly informed concerning all of the steps required to complete the legalization process, both initially and as actions are taken on their applications, particularly where further action on their part may be called for;

   c) Recognize the need to extend completion times where applicants are unable to fulfill educational requirements due to a shortage of educational facilities or programs;

   d) Supplement existing mail communication with applicants, including through the use of broadcast media. Particular attention should be paid to the mobility of many applicants, as well as to the fact that applicants have not always understood the multiple-step nature of the process, and thus have not realized that INS may be seeking to communicate with them.

2. INS should ensure that RPFs have sufficient access to legal advice from INS attorneys; however, the RPFs should not seek legal advice from the Legalization Appeals Unit (LAU), the office that reviews appeals of RPF decisions.

3. INS should consider making the following modifications in the way applications are processed by the Legalization Offices (LOs) and RPFs:

   a) Including in the recommendation forms used by the LOs an additional option, "recommended scrutiny", in order to assure that the RPF reviews the application, without having to recommend denial for lack of another option.

b) Arranging for the following in cases where fraud is suspected:

- i) reinterviewing applicants whose cases have not been decided; in the case of SAW applicants, such interviews should be done by specially-trained decisionmakers with knowledge of agriculture.
- ii) using video cameras to tape remaining interviews, in order to have a record on which credibility can be better assessed.
- iii) assigning remaining cases at the RPFs to specially trained teams of decisionmakers; in the case of SAW applicants, such decisionmakers should be trained to review agricultural cases and the types of fraud that may appear in such cases.

c) Considering whether LO personnel should have more direct impact on legalization decisions, since they are the ones who actually have the opportunity to assess the credibility of applicants.

Statement 15

Procedures for Resolving Federal Personnel Disputes

In 1978, Congress enacted the most comprehensive revision of the federal civil service laws since the Pendleton Act of 1883. The Civil Service Reform Act (CSRA) of 1978 created new institutions and processes for personnel management, including a substantially restructured system for considering complaints, grievances and appeals filed by federal employees in response to personnel actions.[1] Personnel disputes typically involve such matters as removals from the service, reductions in pay or grade, suspensions, furloughs, promotion and award decisions, and reductions-in-force.

Congress' 1978 revision of the framework for considering employee complaints, grievances and appeals was in part prompted by the confusing, complex and time-consuming nature of the existing procedures. Moreover, the procedures were seen as intimidating to both managers and employees and, therefore, likely to deter managers from taking appropriate personnel action and to discourage employees from pursuing available avenues to vindicate their rights. There was also a perception that the Civil Service Commission was unsympathetic to employee discrimination cases and to unions.

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[1] Five institutions share in the administration of the CSRA:

1.Office of Personnel Management (OPM), which is vested with the general authority to execute, administer and enforce the laws and rules governing the civil service except with respect to those functions vested in other agencies;

2.Merit Systems Protection Board (MSPB), which is an independent adjudicatory body charged with hearing and deciding employee appeals from agency personnel actions of various kinds including major performance and disciplinary actions;

3.Office of the Special Counsel (OSC), which is charged with the investigation and prosecution before the MSPB of requests for corrective and disciplinary action when prohibited personnel practices have allegedly occurred;

4.Equal Employment Opportunity Commission (EEOC), which enforces various anti-discrimination statutes as they apply to both public and private employment, including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Rehabilitation Act; and

5.Federal Labor Relations Authority (FLRA), which is an independent agency charged with hearing and deciding complaints of unfair labor practices and reviewing arbitration awards on matters falling within the scope of negotiated grievance procedures established by collective bargaining agreements.

The statutory framework created in 1978, with its new forums for adjudicating employee claims, was no less complex and has continued to produce costs, delays, and confusion, accompanied by substantial resource commitments. Close scrutiny discloses that this complexity was in large part created by the tension inherent in the simultaneous pursuit of three important legislative goals: adequate protection of employees from discrimination;[2] uniformity in federal personnel management; and solidification and expansion of the place of arbitration as a mechanism to resolve federal employee grievances.

As a general principle, procedures for handling federal employee disputes should be as simple and fair as feasible. Fairness must include a concern for the timely, final resolution of claims. At the same time, however desirable procedural simplification may be, federal employees and managers alike should have confidence in the processes for adjudicating personnel disputes. This is especially true when a federal employee contests a personnel action on the grounds of discrimination, since nothing is more basic than the right to be free of invidious discrimination.

To address these matters, the Administrative Conference commissioned a consultant's report.[3] The report describes the historical background to the 1978 reforms, along with the institutional and procedural framework created by the CSRA. It examines the operation of the system and makes specific recommendations for legislative and administrative changes. The Conference's Committee on Governmental Processes has held numerous meetings to consider the report, has provided opportunity for public participation in those meetings, and has invited public comment on various procedural changes that might be recommended.

This process has demonstrated the continuing importance of employee and management concerns in addressing the procedural questions that are the subject of the study. The intricate web of processes, consciously designed by Congress in its enactment of the CSRA, resulted in part from substantive policy and value judgments that transcend the domain of administrative procedure. The complex framework has been perceived by employees and their representatives as providing necessary protection against possible arbitrary employer action, particularly in cases where discrimination is alleged. As a result, employees may perceive proposed procedural simplification as a potential threat to substantive rights.

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[2] "Discrimination" refers to discrimination on the basis of race, color, religion, sex, national origin, age, and handicapping condition.

[3] William V. Luneburg, *The Federal Personnel Complaint, Appeal, and Grievance Systems: A Structural Overview and Proposed Revisions*, 78 KY. L. J. 1 (1989).

For this reason, whether to retain or modify the present procedures must be resolved largely through the legislative process. The experience of the past decade, as described in the consultant's report, has persuaded the Administrative Conference that the time is ripe for fresh consideration by Congress of the problems that gave rise to the CSRA and to the issues that have developed subsequently. In fact, Congress has started to re-examine selected aspects of the system, including equal employment opportunity. In addition, the EEOC has issued a notice of proposed rulemaking to change substantially the federal sector discrimination complaint process.[4]

This Statement describes certain important issues that we believe should be addressed as part of a comprehensive congressional review of the CSRA processes. These include:

(i) whether there should be one rather than the present two opportunities for a full scale trial-type proceeding in cases raising claims of discrimination;

(ii) whether to retain the existing complex structure for administrative adjudication of "mixed" cases, i.e., those in which the employee alleges that unlawful discrimination was the basis for an adverse personnel action;

(iii) whether the government should have the right to appeal to the courts in cases involving claims of discrimination;

(iv) whether employees or their unions should be permitted to seek judicial enforcement of arbitral awards; and

(v) whether the functioning of existing adjudicatory frameworks--grievance systems of individual agencies, agency complaint processes for discrimination cases, the MSPB process and the various negotiated grievance processes--could and should be improved.

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[4] *See* "Federal Sector Equal Employment Opportunity" (29 CFR Part 1614), 54 Fed. Reg. 45747 (October 31, 1989).

These questions cannot and should not be examined in isolation, as any review of the procedures of the CSRA should recognize the integrated nature of the complex processes of the Act. Whether or not congressional re-examination takes place, this Statement also suggests that the Office of Personnel Management and agencies scrutinize and, where appropriate, seek ways to improve the patterns of communication within agencies and to employees regarding the workings of the complaint, grievance and appeal system. The Conference encourages the creative use of alternative means of dispute resolution in resolving employee claims.[5]

A. Need for Comprehensive Overview.

In considering the issues posed below, Congress should take into account the fact that the intricate federal personnel scheme consists of numerous interrelated processes and institutions. Accordingly, statutory changes should be enacted only after careful consideration of their potential direct and indirect consequences throughout the system for resolving employee complaints, grievances and appeals.

B. Cases Raising Claims of Discrimination.

1. *The Number of Hearings in Mixed Cases.* "Mixed" cases are controversies involving personnel actions appealable to the MSPB, where an employee alleges that unlawful discrimination was a basis for the agency's action. These cases are "mixed" in that they involve issues both of civil service law and employment discrimination. Under present law federal employees, unlike employees in the private sector, on allegations of employment discrimination in such cases, have a right to a full trial-type administrative hearing (at the MSPB) and, if unsuccessful, may obtain a second de novo adjudicatory hearing in United States District Court. The question for congressional consideration is whether an employee who has chosen a trial-type administrative hearing in a mixed case, and has then been afforded the opportunity for a full evidentiary hearing on the record on all relevant matters, should be entitled to a judicial trial de novo or should be limited to

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[5] *See* Recommendation 86-3, Agencies' Use of Alternative Means of Dispute Resolution, 1 CFR 305.86-3.

judicial review in a court of appeals on the administrative record under the substantial evidence test--the customary venue and scope of review of formal administrative adjudications.

2. *The Process for Deciding Mixed Cases.* The statutory procedure for mixed cases provides the opportunity for sequential consideration by the MSPB and the EEOC, with the possibility of further proceedings before a Special Panel consisting of one member of the MSPB, one member of the EEOC, and a chairman appointed by the President for a term of six years with the advice and consent of the Senate. Through these provisions, the CSRA embodies Congress' effort to bring to bear both the MSPB's expertise in general issues of personnel law and the EEOC's expertise with discrimination issues. This complex procedure is intended to achieve a balanced use of both agencies' expertise.

In most mixed cases presented to the EEOC, the Commission has accepted the MSPB decision and, where it has not, the MSPB has generally deferred to the Commission's disposition of these cases. During the first ten years of the CSRA, there have been only three Special Panel proceedings, indicating that the two agencies have failed to reach an accommodation in only a very limited number of cases. Even where a Special Panel was unnecessary, however, sequential consideration by the MSPB and the EEOC has required significant time and effort and has at times led to confusion on the part of agencies and claimants. The question for congressional consideration is whether experience confirms the desirability of dual agency participation in mixed cases or whether that experience suggests that consistently fair and more timely results may be achieved through a less complex process.

3. *Government's Right to Appeal.* Under existing law the government may petition for judicial review of certain administrative and arbitral decisions in personnel cases that present significant issues of civil service law. The availability of such review is either uncertain or non-existent when those decisions implicate issues of discrimination law.[6] There is disagreement over the desirability of permitting the government to seek a judicial resolution of legal issues that have been decided adversely to the government at the administrative level.

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[6] *See, e.g.*, Moore v. Devine, 780 F.2d 1559 (11th Cir. 1986).

The question for congressional consideration is whether in the interest of consistency the government should have the right to judicial review (or at least the authority to petition for it) in cases where the Director of OPM determines that an administrative or arbitral decision constitutes an incorrect interpretation of civil service or discrimination law that may have a substantial impact. The primary countervailing considerations are the increased potential for further delay in final resolution of such cases and whether the executive branch should be authorized to seek judicial resolution of disputes between two of its agencies, as would be the case if OPM were permitted to appeal from adverse determinations of the EEOC.

C. Enforcement of Arbitration Awards.

Although federal employee grievance arbitration awards are intended to be binding, federal agencies do not always comply with them. Under the CSRA, the only mechanism available to a federal employee seeking to enforce an arbitral award is an unfair labor practice proceeding before the FLRA. Such a proceeding requires filing of a complaint by the Authority's General Counsel and a hearing before the FLRA, followed by judicial review and enforcement of the resulting FLRA order. There is substantial dispute over the question whether an employing agency may raise any defense to an enforcement action other than compliance with the arbitral award.

Questions for congressional consideration include whether to permit an employee or union to seek direct judicial enforcement of federal sector grievance arbitration awards, where such enforcement should take place, and what issues should be open for litigation in the chosen forum. A central issue is whether permitting such direct enforcement actions would increase or decrease the likelihood of voluntary agency compliance with arbitration awards.

D. Need to Examine Existing Adjudicatory Systems.

1. *Agency Administrative Grievance Systems.* Agency administrative grievance systems have taken on increasing importance as the only avenue of redress[7] available to an individual employee in cases not falling within MSPB or

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[7] *See, e.g.*, Harrison v. Bowen, 815 F.2d 1505 (D.C. Cir. 1987).

EEOC jurisdiction or within the scope of a negotiated grievance procedure. The Office of Personnel Management and other agencies should ensure that these systems in fact provide fair, efficient, and timely resolution of workplace disputes, and further studies of the structure and usage of these systems may be needed.[8] In reviewing these processes, agencies should give careful consideration to alternative means of dispute resolution.

2. *Agency Complaint Processes in Discrimination Cases.* Over the years, criticism has been leveled at the quality and timeliness of agency disposition of discrimination complaints. The EEOC and individual employing agencies should continue to take steps to ensure adequate and expeditious investigation and timely, final resolution of such claims. Experimentation with, and incorporation of, alternative dispute resolution techniques may be useful.

3. *MSPB and Negotiated Grievance Systems.* The MSPB process and the various negotiated grievance processes dispose of large numbers of significant employee claims. Concerns have been expressed regarding certain aspects of their operation, including the familiarity of arbitrators with federal personnel law and the need for increasing the statutory independence of the MSPB's administrative judges. These concerns may warrant further study.

E. Better Communication Within Agencies and to Employees.

Multiple avenues for relief present the danger of parallel, duplicative proceedings. Agencies should take steps to ensure that there are consistent patterns of communication among their personnel, labor relations and equal employment opportunity staffs to reduce the likelihood of parallel, duplicative proceedings in personnel actions for which such duplication is not permitted by law.

To use the personnel grievance system effectively, employees must have clear and reliable information about options available to them and the consequences of choosing one route over another. The Office of Personnel Management and other agencies should ensure that there exist readily available and easily understandable written or other materials that inform federal employees of their complaint, grievance and appeal options and the consequences of their choice of one complaint, grievance or appellate route over another.

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[8] OPM has recently reviewed the systems established by agencies and has published a study entitled A SURVEY OF AGENCY ADMINISTRATIVE GRIEVANCE SYSTEMS (June 1989).

REPORTS

FOR

RECOMMENDATIONS 89-1 THROUGH 89-10

AND

STATEMENTS 14 AND 15

Administrative Law Issues Involving the Medicare Utilization and Quality Control Peer Review Organization (PRO) Program: Analysis and Recommendations

TIMOTHY STOLTZFUS JOST*

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VIII. HOSPITAL NOTICES OF NONCOVERAGE

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The author expresses his gratitude to the more than 80 experts on the PRO program who were interviewed in preparation for this Article. Special thanks are due to representatives from 12 PROs who cooperated and gave in-depth interviews. While singling out any of the many individuals who assisted in this study risks slighting others who also contributed much, the author must acknowledge the substantial contributions of Alan Kaplan, Alice Gosfield, Nancy Miller, and Sanford Teplitzky, who offered extensive comments on drafts; Jeffrey Lubbers and Philomena Dane, editors; Randal Baringer, research assistant; and Michele Whetzel-Newton, secretary.

IX. Utilization Review Denials, Reconsiderations, and Appeals
X. PRO Data Confidentiality and Disclosure
XI. Conclusion

I. Introduction

The Medicare Utilization and Quality Control Peer Review Organization (PRO) program is an administrative law curiosity. The PRO program is the federal government's primary tool for assuring that services provided to Medicare beneficiaries are medically necessary, are of a quality that meets professionally recognized standards of health care, and are provided in an appropriate setting.[1] It both protects the health and safety of Medicare beneficiaries and controls the cost of the Medicare program.

The power of PROs over Medicare providers, practitioners, and beneficiaries is sweeping. If a PRO determines that medical services do not meet utilization or quality standards, it may retrospectively deny Medicare payment for those services.[2] A PRO may also deny payment prospectively for some prescribed procedures, effectively blocking a beneficiary from receiving those services unless the beneficiary can independently afford them.[3] It may also recommend to the Office of the Inspector General (OIG) of the Department of Health and Human Services (HHS) that a provider or practitioner[4] be fined or excluded from receiving payment under the Medicare program. As a practical matter, exclusion from Medicare may make it impossible for a physician to practice; thus the PRO's power over physicians is nearly as great as that of state licensure boards.

More striking than the scope of the PRO's authority is the fact that in many instances PRO decisions are either not reviewable or are reviewable only after they have been implemented. A hospital or physician, for example, cannot in most cases obtain independent review of the decision of a PRO to deny payment for a claim from either an Administrative Law Judge (ALJ) or a court—the PRO's decision is final.[5] PRO-initiated sanctions and penalties assessed against providers and practitioners are usually not reviewable until months after they have been implemented.[6]

From an administrative law perspective, however, the most striking feature of PROs is that, despite their substantial, often unreviewable power, they are private entities that provide services for the federal government on a contractual basis.[7] The private nature of PROs is intentional and based on the philosophy of medical peer review. From the beginning, PROs (like the Professional Standards Review Organizations before them) were established so that private doctors participating in the Medicare program could have their work reviewed by other private doctors, with a minimum of interference from the federal government. The quasi-private nature of PROs is also reflected in the scope of their activities. Though many PROs were formed explicitly to perform Medicare review, they are not limited to this function; indeed federal law encourages them also to perform review for private and other public entities.[8] A recent study found that, in fact, 73% of PROs conduct review for business entities and 68% for state Medicaid programs.[9] Several spent less than 50% of their time on Medicare-related activities.

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[1] Social Security Act, 42 U.S.C. § 1320c-3(a)(1) (1982 & Supp. IV 1986).

[2] *Id.* § 1320c-3(a)(2).

[3] Health Care Fin. Admin., U.S. Dep't of Health & Human Servs., Third Scope of Work § X, at 26 (1987) [hereinafter Third Scope of Work]. The *Third Scope of Work* is the request for proposals governing PRO contracts during the current contract cycle; for further explanation, see *infra* text following note 56.

[4] Under the Medicare law, a provider is an institutional health care entity, such as a hospital or nursing home. 42 U.S.C. § 1395x(u). A practitioner is a physician or other individual who provides health care.

[5] *See infra* text accompanying notes 423–27.

[6] 42 U.S.C. § 1320c-5(b)(2) (1982); 42 C.F.R. §§ 1004.100(b), .130(a)(3) (1987). A recent draft report of the HHS OIG notes that on average it takes 15 months from the date of a PRO recommendation to the OIG to completion of the appeal. Office of Inspector General, U.S. Dep't of Health & Human Servs., The Utilization and Quality Control Peer Review Organization (PRO) Program: Sanction Activities (draft) 16 (Mar. 1988) [hereinafter OIG Sanction Report]. There is, however, a special exception for certain rural practitioners, who may receive a pre-exclusion ALJ hearing. 42 U.S.C. § 1320c-5(b)(5) (1982).

[7] 42 U.S.C. §§ 1320c-1 to -2(b) (1982 & Supp. IV 1986).

As private entities, PROs are not generally subject to the statutes governing federal administrative law. The court in *Public Citizen Health Research Group v. HHS*[10] concluded that Professional Standards Review Organizations (PSROs), the predecessors of PROs, were private independent contractors and not federal agencies for purposes of the Freedom of Information Act (FOIA). A more recent case held that PROs are not federal agencies for purposes of the attorneys fees provisions of the Equal Access to Justice Act.[11] Presumably PROs are also not federal agencies for purposes of the Administrative Procedure Act (APA).[12]

This is not to say that PROs are unfettered by administrative law. The federal PRO statute, regulations, and *Manual* specify procedures to be followed by the PROs for rulemaking, adjudication, and data disclosure. Indeed, as the importance of the PRO program has grown, these requirements have tended to proliferate, providing increasingly more protection for those affected by the PROs, but also leaving the law affecting PROs in an increasingly confused state. Moreover, in carrying out their federal review activities, PROs are, as will be discussed below, federal actors subject to the due process requirements of the Constitution.[13] There is, therefore, a substantial body of statutory, regulatory, and constitutional law that dictates how the PROs should conduct themselves in relating to the beneficiaries, providers, and practitioners they regulate.

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[8] *Id.* § 1320c-3(a)(11) (1982). *See* Hastings, *Legal Issues Raised by Private Review Activities of Medical Peer-Review Organizations*, 8 J. Health Pol. Pol'y & L. 293 (1983) (an excellent article considering the PRO private review side, which is not considered in this Article).

[9] Office of Inspector General, U.S. Dep't of Health & Human Servs., The Utilization and Quality Control Peer Review Organization (PRO) Program: An Exploration of Program Effectiveness (draft) 3 (June 1988) [hereinafter OIG Effectiveness Report].

[10] 668 F.2d 537 (1981). This holding is reaffirmed by the more recently adopted PRO statute, which explicitly states that PROs are not federal agencies under the FOIA. 42 U.S.C. § 1320c-9(a) (1982).

[11] Oster v. Bowen, 682 F. Supp. 853, 856–57 (E.D. Va. 1988); 28 U.S.C. § 2412(b) (1982 & Supp. IV 1986).

[12] 5 U.S.C. §§ 551–559 (1982); *but see* J. Blum, P. Gertman & J. Rabinow, PSROs and The Law 119–29 (1977) (arguing that PSROs should be considered federal agencies under the APA and FOIA).

[13] *See infra* notes 98–99, 259–70. The question of whether PROs are federal actors has not come up in cases to date. Most decided cases have challenged sanctions imposed by the OIG, which clearly is part of the federal government. In these cases, the question of the constitutionality of PRO procedures arises only derivatively, as part of the process of generating sanctions ultimately imposed by the OIG. In one case, however, Kuown v. Southeast Mo. PSRO, 811 F.2d 401 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1994 (1988), the court decided that PSROs were federal actors absolutely immune from civil rights claims under the Constitution and thus held implicitly that they were in fact subject to the Constitution, as the question of immunity would not arise were they not.

This Article examines both what the law with respect to PROs is and what the law should be. Part II provides a general description of the PRO program. Parts III through X consider the following eight areas in which administration of the PRO program affects beneficiaries, providers, and practitioners: the adoption by HHS of rules, policies, contracts, and instructions that govern the PROs; the formulation and dissemination of criteria, norms, and standards by the PROs; the PRO process for sanctioning providers and practitioners who provide care that is unnecessary or of substandard quality; denial of payment for substandard care; the investigation by the PROs of beneficiary complaints regarding practitioners and providers; the PRO process for reviewing proposed hospital discharges of beneficiaries; the processes through which PROs deny payment for improper utilization of medical care and reconsider those denials; and the considerations governing PRO data dissemination and confidentiality. As to each of these subjects, this Article examines the current state of the law and practice and relevant policy considerations and recommends improvements in current procedures.

This Article draws on a variety of information sources. It is based in part on a review of the relevant statute, regulations, manual instructions, and scopes of work governing the PRO program and the rapidly growing body of court cases and ALJ opinions considering PRO issues. It also draws on dozens of articles from the medical and legal literature; testimony to congressional committees; position statements of affected groups; and reports from the General Accounting Office, HHS OIG, and other evaluators of the PRO program. Finally, it draws on interviews with nearly eighty informants, including seventeen representatives of national, state, and local beneficiary organizations; eleven representatives of provider groups; twelve attorneys who represent providers; twenty-three PRO representatives; and fourteen representatives of the federal government. These included in-depth interviews with representatives from twelve PROs (in most instances executive directors) reviewing the current procedures of those PROs in each of the areas under consideration.[14] Finally, this Article considers comments received on an earlier draft from interested persons and organizations.

II. THE PRO PROGRAM

The initial Medicare law adopted in 1965 gave little attention to regulating the medical necessity, appropriateness, and quality of services provided Medicare beneficiaries. It required only hospital-based utilization review committees to assure appropriate utilization of services,[15] state licensure to assure that physicians were minimally qualified,[16] and accreditation by the Joint Commission on Accreditation of Hospitals to guarantee the quality of hospitals.[17] By the early 1970s, however, it was becoming apparent that further controls were needed to limit excessive utilization of Medicare services.[18] Out of this concern grew the PSRO program, which used regional nonprofit physicians groups to review independently the use of medical services by beneficiaries of federal medical assistance programs, including Medicare.[19] Though the primary emphasis of PSROs was on utilization review, they also conducted Medical Care Evaluation Studies (later Quality Review Studies) aimed at improving the quality of medical care. PSROs never succeeded in meeting the expectations of their supporters or overcoming the criticisms of their increasingly vocal detractors. In 1982 the Tax Equity and Fiscal Responsibility Act (TEFRA) abolished the PSRO program and created in its stead the PRO program.[20]

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[14] The PRO representatives interviewed were from the states of New Jersey, Pennsylvania, Virginia, Florida, Illinois, Texas, North Dakota, Iowa, California, Washington, Minnesota, and Michigan. The Iowa PRO also has the contract for Nebraska and the Washington PRO for Idaho and Alaska, so these programs were also discussed.

[15] Social Security Amendments of 1965, Pub. L. No. 89-97, § 1861(k), 79 Stat. 285, 318–19 (1966).

[16] *Id.* § 1861(r), 79 Stat. 285, 321.

[17] *Id.* § 1865, 79 Stat. 285, 326–27.

The PRO program was intended to be a leaner and more effective program than its predecessor. The 195 PSRO regions were trimmed to 54 statewide areas. The old system of grant-funding was replaced by biennial (now triennial) contracts, to be awarded by competitive bidding. Ineffective PROs were to be terminated. PROs could no longer delegate utilization review functions to hospitals, as had the PSROs. Though PROs were initially to be physician-sponsored organizations (as were the old PSROs), the statute allows HHS to turn to other organizations, including insurance companies or Medicare fiscal intermediaries, for PRO services if initial physician-sponsored contractors prove ineffective. Unlike PSROs, PROs could be for-profit entities. Finally, the PROs were given enhanced sanction and payment denial authority to enforce their power.[21]

In the year following the creation of the PRO program (before it was in fact implemented), Congress adopted a prospective payment system (PPS) for Medicare based on diagnosis-related groups (DRGs).[22] This system ended the prior cost-related reimbursement system, under which Medicare had reimbursed hospitals the costs they incurred in caring for Medicare patients, and substituted for it a program that paid hospitals primarily on a lump sum per hospitalization basis.

This change solved one problem addressed by the PROs, but created others. The old system had rewarded hospitals for keeping patients in the hospital as long as possible (which increased their costs and thus their reimbursement); thus a major focus of PSRO utilization review had been controlling the length of inpatient hospital stays. Because the new DRG system creates incentives for hospitals to minimize their costs by discharging patients as soon as possible, the problem of excessive length-of-stay has been solved. This problem has been replaced, however, by other serious problems: the DRG system creates incentives for hospitals to discharge patients prematurely, to underserve them while in the hospital, and to try to game the system, either by transferring patients between hospitals or units within hospitals or by assigning improper DRGs. These practices can potentially lead to lower quality care for patients; therefore, every major budget reconciliation act since 1983 has included provisions redirecting the mission of PROs to address the potential quality and access problems created by the DRG reimbursement system.

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[18] *See* SENATE COMM. ON FIN., S. REP. NO. 1230, 92d Cong., 2d Sess. 254–69 (1972); SENATE COMM. ON FIN., MEDICARE & MEDICAID, PROBLEMS, ISSUES AND ALTERNATIVES, 91st Cong., 2d Sess. 105–09 (Feb. 9, 1970).

[19] Social Security Amendments of 1972, Pub. L. No. 92-603, § 249F, 86 Stat. 1329, 1429–45 (1972).

[20] Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 143, 96 Stat. 324, 382 (1982).

[21] *See* CISLOWSKI, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, THE PEER REVIEW ORGANIZATION PROGRAM 4–5 (1987); LOHR, PEER REVIEW ORGANIZATIONS: QUALITY ASSURANCE IN MEDICARE (The Rand Paper Series) 7, 14–15 (1985); Mellette, *The Changing Focus of Peer Review Under Medicare*, 20 U. RICH. L. REV. 315 (1986) (describing the changes from the PSRO to PRO program).

[22] Social Security Amendments of 1983, Pub. L. No. 98-21, Title VI, 97 Stat. 65, 149–72 (1983).

There are currently forty-four PROs serving the fifty-four PRO areas.[23] Sixty-eight percent were formerly PSROs.[24] Eighty-four percent are "physician-sponsored"—that is, they are either composed of at least 20% of the physicians practicing in the review area or of 10% of the physicians in the area and are otherwise representative of the state physician community.[25] The remaining PROs are "physician access" organizations, usually insurance companies, having a sufficient number of physicians available to carry on review functions.[26] HHS is supposed to give preference in contracting to "physician-sponsored organizations," if any are available.[27] PROs must include on their boards at least one consumer representative.[28] The PROs vary significantly in size, the largest having hundreds of employees and budgets of millions of dollars. The proposed budget for the PRO program for fiscal year 1989 is $257.4 million, an increase of 50% over fiscal year 1988.

PROs are delegated review responsibility under contracts with HHS. Until this year, these contracts were bid on a two-year cycle, but now they last for three years.[29] HHS may terminate a PRO that has substantially failed to carry out its contract.[30] HHS monitors PRO performance primarily through three methods: (1) periodic data reporting from the PROs, (2) the PRO Monitoring Protocol and Tracking System (PROMPTS-2) regional office review system, and (3) the SuperPRO, an independent contractor, which verifies PRO reviews.[31] The PRO program is supervised by the Health Standards and Quality Bureau (HSQB) of the Health Care Financing Administration (HCFA) of HHS.

The primary tasks of the PROs are to process data concerning health care services provided to Medicare beneficiaries[32] and to intervene when these data indicate that services have been provided unnecessarily, inappropriately, or with inadequate quality. Because hospitals consume over two-thirds of Medicare expenditures, PROs have focused their review traditionally on care provided to beneficiaries by doctors in hospitals. Recently many of the PROs have begun to review care provided by health maintenance organizations and competitive medical plans (HMOs/CMPs) with Medicare risk-sharing contracts.[33] The Omnibus Budget Reconciliation Act of 1986[34] (OBRA '86) also requires PROs to stretch their review capacity to cover services provided in other settings, including post-acute care provided by skilled nursing facilities and home health agencies; ambulatory and hospital outpatient care; and beginning in 1989 care provided by physicians in their offices.[35] Most PROs, however, still focus the vast majority of their resources on review of care provided in hospitals, the primary concern of this Article.

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[23] OIG EFFECTIVENESS REPORT, *supra* note 9, at 3.

[24] *Id.*

[25] *Id.*; 42 C.F.R. § 462.102 (1987).

[26] 42 C.F.R. § 462.103 (1987).

[27] 42 U.S.C. § 1320c-2(b)(1) (1982).

[28] *Id.* § 1320c-1(3) (Supp. IV 1986).

[29] *Id.* § 1320c-2(c)(3) (1982).

[30] *Id.* § 1320c-2(c)(6). Such a termination is not subject to judicial review. *In re* Pa. Peer Review Org., 50 Bankr. 640 (1985); 42 U.S.C. § 1320c-2(f) (1982).

[31] OIG EFFECTIVENESS REPORT, *supra* note 9, at 12–18; GAO, MEDICARE: IMPROVING QUALITY OF CARE ASSESSMENT AND ASSURANCE 53–58 (May 1988).

[32] PROs also review Medicaid cases for states that contract for such assistance, 42 U.S.C. § 1320c-7, and review for private payers, *id.* § 1320c-3(a)(11).

The principal source of data for PRO review is the hospital record. PROs regularly receive from fiscal intermediaries (the insurance companies and other entities that handle Medicare reimbursement to providers) data on bills paid for services rendered to Medicare beneficiaries. The PRO selects a sample of these cases for review and requests medical records on these cases from the hospitals, which are reviewed at the hospital or at the PRO office.[36] The sampling criteria that PROs use for selecting cases for review, and the focus of their review in examining the records, have varied over the three contract cycles during which PROs have been in operation. During each contract cycle, the screening criteria and focus of PRO activity have been established by a scope of work.[37]

The sampling criteria mandated by the *Third Scope of Work*, currently being implemented, require a PRO to review, for each PPS hospital (hospitals reimbursed under the DRG prospective payment system) under its jurisdiction, a 3% random sample of all discharges; 50% of cases involving transfers from one PPS hospital to another; 10% of transfers to a psychiatric bed in a PPS hospital (and 100% of certain problem transfers to psychiatric beds); 25% of transfers from a PPS hospital bed to a nursing home bed in the same hospital; 25% of cases in which a patient discharged from a PPS hospital is readmitted within thirty-one days; 20% of cases in the 25% discharge and readmission sample just mentioned, in which the patient received care from a nursing home, home health agency, or hospital outpatient area during the period intervening between hospitalizations; 25%, 50%, or 100% of cases coded with certain problem DRGs; 25% of day and cost outliers (cases in which hospitals received extra payment beyond the DRG reimbursement because the case required an extraordinarily long or expensive hospital stay); all cases with targeted principal diagnoses, such as obesity or pacemaker fitting or adjustment; all cases in which a hospital has requested that a case be adjusted from a lower to a higher DRG; all cases in which a hospital has determined that an admission was not covered but the patient required Medicare-covered care at some time during the stay; and all cases referred to the PRO by the fiscal intermediary or by HCFA.[38] PROs are also required to review a random sample of 15% of discharges from non-PPS units of PPS hospitals (for example, rehabilitation units) and from non-PPS-reimbursed hospitals and a 5% random sample of cases from ambulatory surgical centers.[39] When reviews indicate that a hospital is committing errors in more than 5% of its cases (or six cases if this amount is greater), the PRO is to intensify review to 50% or 100%, depending upon the problem, of the hospital's Medicare cases.[40]

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[33] *See* Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 9405, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 83, 201 [hereinafter COBRA '85], *as amended by* Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9353(a), 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1874, 2044 [hereinafter OBRA '86].

[34] OBRA '86, Pub. L. No. 99-509, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1874.

[35] *Id.* § 9353(a), (f), 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1874, 2046, 2052.

[36] A recent study found that 61% of PROs usually perform review on-site at the hospital; 20% always perform it on-site. OIG EFFECTIVENESS REPORT, *supra* note 9, at 3.

[37] For a further description of a scope of work, see *infra* text following note 56.

To this point, all the reviews listed are retrospective. The PROs must also perform preadmission or preprocedure review of ten specific procedures and the use of assistants for cataract surgery.[41] Finally, a separate HMO/CMP *Scope of Work* provides a sampling procedure for identifying HMO/CMP cases to be reviewed. The intensity of sampling of HMO/CMP cases is related to the confidence that the PRO has in the HMO/CMP's own internal quality control capacity. In total, sample cases under the second contract cycle totaled about 26% of all Medicare hospital admissions.[42]

Once medical records fitting these sample criteria are identified and copied, they are reviewed by professional reviewers (usually nurses), who apply criteria screens to identify utilization or quality problems. This review must be completed within sixty days from the date of receipt of the list of cases from the fiscal intermediary.[43] Each inpatient hospital discharge is to be reviewed for quality using HCFA's generic quality screens, for necessity and appropriateness using PRO discharge and admission criteria screens, and for DRG validation.[44] Care provided outside of the hospital setting is reviewed only for quality and not for utilization problems.

Once a PRO identifies a problem through this review of medical records, the case is routed to a physician reviewer. If the physician confirms the problem, the case can go in one of two directions. First, if a quality problem is identified, the case is routed to the PRO quality assurance system, which can interpose various interventions (including sanctions ultimately) to correct the problem.[45] If, on the other hand, the problem is identified as a utilization problem, the case is considered for a payment denial.[46] PROs also continually assemble profile data in an effort to identify aberrant providers and physicians. Profiles are kept on patients, physicians, hospitals, DRGs, diagnoses, and procedures to monitor PRO impact and identify problems for further study.[47]

PROs have a number of other functions unrelated to their data gathering and analysis functions. They are responsible for reviewing cases when hospitals inform patients that their care is not, or is no longer, covered by Medicare.[48] PROs are also responsible for monitoring to assure that hospitals provide beneficiaries with a statement of their rights to PRO discharge review at the time of admission.[49] They are required to investigate complaints by Medicare beneficiaries about the quality of Medicare-covered services received from Medicare-certified hospitals, nursing homes, home health agencies, or ambulatory surgical centers.[50] Finally, PROs are responsible for educating beneficiaries and providers as to their existence and functions.[51]

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[38] THIRD SCOPE OF WORK, *supra* note 3, § VI, at 16–22.

[39] *Id.* §§ VII–VIII, at 22–23.

[40] *Id.* § IX, at 24–26.

[41] *Id.* § X, at 26–27.

[42] *HCFA Official Outlines PRO Program Objectives*, HOSPITALS, Aug. 5, 1987, at 122.

[43] THIRD SCOPE OF WORK, *supra* note 3, § III(B), at 2–3.

[44] These screens, and problems associated with them, are described further in Part IV of this Article.

[45] The PRO quality assurance/sanction process is described in Part V of this Article.

[46] Payment denials and reconsiderations are considered in Part IX below.

[47] THIRD SCOPE OF WORK, *supra* note 3, § XV, at 29–32.

III. Publication of PRO Program Policies and Procedures

One major administrative law issue that has arisen under the PRO program concerns the extent to which directives and guidelines governing the program must be promulgated as rules under the APA. At the time the program was initiated in 1982, some regulations survived from the PSRO program that preceded it. Additional regulations have been promulgated that address issues such as PRO eligibility, area designations, imposition of sanctions, confidentiality and disclosure, reconsiderations and appeals, and review activities.[52]

These regulations, however, represent only a small portion of the instructions HHS has issued to govern the PRO program. First, HHS has issued a *PRO Manual*, supplemented periodically by manual transmittals and interim manual instructions. Chapters in the *Manual* address such issues as PRO review procedures; PRO denials, reconsiderations, and appeals; waiver of liability determinations; sanctions; data and reports; and PRO administration. Some portions of the *Manual* track closely the statute and regulations.[53] Even these sections, however, cover details not addressed by the regulations.[54] Other parts of the *Manual* cover issues not addressed by the regulations but clearly internal to the PROs, such as the data and reporting requirements appearing in detail in *Manual* Chapter 8. Finally, some *Manual* provisions that have effects external to the PROs differ materially from the PRO regulations.[55] PRO activities are also affected by provisions in other HCFA manuals, such as the *Medicare Hospital Manual*.[56]

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[48] 42 U.S.C. § 1320c-3(e) (Supp. IV 1986). This procedure is discussed at Part VIII below.

[49] Third Scope of Work, *supra* note 3, § XVI, at 33–34.

[50] 42 U.S.C. § 1320c-3(a)(14) (Supp. IV 1986); Third Scope of Work, *supra* note 3, § XVII(A), at 36–38

[51] 42 U.S.C. § 1320c-3(a)(4)(B) (Supp. IV 1986); Third Scope of Work, *supra* note 3, § XVI(C), at 34–35 For further background on the PRO program, refer to Cislowski, *supra* note 21; Lohr, *supra* note 21; Mellette, *supra* note 21.

[52] The initial set of regulations was promulgated at 401 Fed. Reg. 7,201 (Feb. 27, 1984) and 50 Fed. Reg. 15,311 (Apr. 17, 1985) and codified at 42 C.F.R. pts. 400, 405, 420, 422, 431, 433, 456, 460, 462, 466, 473, 474, 476, and 489 (1987). On September 30, 1986, rules governing imposition of sanctions were redesignated to 42 C.F.R. pt. 1004 (1987). On October 7, 1987, HHS published rules governing PRO HMO/CMP review. 52 Fed. Reg. 37,545 (Oct. 7, 1987). These rules were published as final without a notice of proposed rulemaking (NPRM) under the APA good-cause exception to effectuate in a "timely manner" provisions of OBRA '85, adopted in October of 1986, which were to be in effect by April of 1987. 52 Fed. Reg. 37,456 (Oct. 7, 1987). Corrections to this notice were published in December of 1987, 52 Fed. Reg. 47,003 (Dec. 11, 1987). Finally, on March 16, 1988, HHS proposed further regulations to implement provisions of COBRA '85, Pub. L. No. 99-272, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 83, and OBRA '86, Pub. L. No. 99-509, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 1874, and to make technical changes necessitated by experience with the PRO program. 53 Fed. Reg. 8,654 (Mar. 16, 1988). Additional provisions requiring PRO review of proposed changes in DRG assignments were also published at 52 Fed. Reg. 33,033, 33,059–60 (Sept. 1, 1987).

[53] *See, e.g.*, U.S. Dep't of Health & Human Servs., Peer Review Organization Manual §§ 4080–4086, Reconsiderations and Appeals (1988) [hereinafter PRO Manual].

[54] 53 Fed. Reg. 8,666 (Mar. 16, 1988). For example, *PRO Manual* § 4084 requires that a reconsideration reviewer be a physician who practices in a similar setting to that of the physician being reviewed whenever possible and that the physician be board-certified or board-eligible in the specialty of the reviewed physician. 42 C.F.R. § 473.28

The other central documents governing the PRO program are the PRO scopes of work and PRO contracts. HHS has recently issued the *Third Scope of Work* for the third contract cycle, and last year it issued a separate *Scope of Work* for review of HMOs and CMPs. HHS is currently entering into contracts reflecting the *Third Scope of Work*. The *Scope of Work* specifies in great detail PRO review responsibilities and data requirements and incorporates by reference the PRO statute, regulations, and *PRO Manual*. PRO contracts specify in even greater detail the review responsibilities and specific objectives of individual PROs. Finally, PROs are also governed by a variety of less formal instructions, such as regional medical review letters.

The practice of relying on manual transmittals, program instructions, and contracts in lieu of regulations promulgated through notice and comment rulemaking is not unique to the PRO program. Throughout its administration of the Medicare and Medicaid programs, HHS has often used such materials in preference to rules adopted through the APA notice and comment process.[57] It is not difficult to understand HHS's preference for issuing instructions informally. Public notice and comment rulemaking has always been burdensome. The requirements of 5 U.S.C. section 553 that the public be given an opportunity to comment on proposed rules, that the agency consider the comments, and that publication of final rules precede their effective date by at least thirty days necessarily slow down the process of implementing policy. Recent restrictions on notice and comment rulemaking, including Executive Orders No. 12,291 and No. 12,498, requiring Office of Management and Budget (OMB) review of some rules, and 5 U.S.C. section 603, requiring regulatory flexibility analyses, have made APA rulemaking increasingly burdensome and time-consuming.[58] It can easily take a year or more to promulgate a rule under these procedures.[59] Regulations implementing sections 9401 and 9403 of COBRA '85[60] have been under consideration for over two years and have only very recently been published as a notice of

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currently only requires that the reconsideration physician be a specialist in the type of services under review, though proposed rule 473.28 (proposed on March 16, 1988) is identical to the *PRO Manual* provision.

[55] *PRO Manual* § 6025, for example, implements the 1987 HCFA/AMA/AARP compromise on sanction procedures, discussed in Part V below and provides procedural protections to providers and practitioners beyond those specified in 42 C.F.R. pt. 1004.

[56] *See* Health Care Fin. Admin., U.S. Dep't of Health & Human Servs., Medicare Hosp. Manual § 312 (July 1988) (dealing with notices to beneficiaries of PRO review of care) [hereinafter Medicare Hosp. Manual].

[57] *See* St. Mary's Hosp. of Troy v. Blue Cross Blue Shield, 788 F.2d 888 (2d Cir. 1986); Cubanski v. Heckler, 781 F.2d 1421 (9th Cir. 1986); Powderly v. Schweiker, 704 F.2d 1092 (9th Cir. 1983), Rio Hondo Memorial Hosp. v. United States, 689 F.2d 1025 (Ct. Cl. 1982); Samuels v. Heckler, 668 F. Supp. 656, 664 (W.D. Tenn. 1986); New York State Dep't of Social Serv. v. Bowen, 648 F. Supp. 850 (D.D.C. 1986); Bond Hosp. Inc. v. Heckler, 587 F. Supp. 1268, 1272 (D.D.C. 1984), *aff'd*, 762 F.2d 137 (D.C. Cir. 1985); Kinney, *The Medicare Appeals System for Coverage and Payment Disputes: Achieving Fairness in a Time of Constraint*, 1 Admin. L.J. 54 (1987).

[58] Although Exec. Order No. 12,291, 46 Fed. Reg. 13,193, only requires OMB review of "major rules," in fact OMB reviews all rules proposed by HCFA.

[59] DeMuth & Ginsberg, *White House Review of Agency Rulemaking*, 99 Harv. L. Rev. 1075, 1159 (1986).

[60] COBRA '85, Pub. L. No. 99-272, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 83, 196–200.

proposed rulemaking (NPRM).[61] Given the rapid changes in the Medicare and Medicaid programs generally and in the PRO program in particular, it is not surprising that HHS has sought means other than notice and comment rulemaking for program management.

While HHS's eschewal of notice and comment rulemaking may be understandable, it is not necessarily right. There are sound policy reasons grounding the APA's requirement of notice and comment rulemaking. First, it "reintroduces public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies."[62] It also assures a prepublication dialogue, which permits persons affected by a rule to educate the agency as to their concerns. This in turn allows the agency to achieve a more rational regulatory scheme or a more intelligible explanation of the scheme it originally proposed.[63] It forces the agency to think carefully about its policies, so as to justify them before a skeptical public.[64] It "assures that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions."[65] Finally, public participation in rulemaking contributes to public acceptance of the legitimacy of the regulatory result.[66] The Administrative Conference of the United States (ACUS) has consistently urged HHS to provide greater opportunity for public comment on its policies for making coverage and payment determinations.[67]

More specifically, the attempts of HHS to govern the PRO program without using the APA rulemaking process have subjected the PROs to a continual and confusing stream of instructions, which have severely hampered their ability to carry out their mandate.[68] They have also angered the providers and practitioners governed by the program.

In October 1984 an association of those providers, the American Hospital Association (AHA), filed a petition with HHS for rulemaking,[69] which requested HHS to promulgate comprehensive regulations for the PRO program. When HHS failed to do so, the AHA brought suit claiming that HHS had violated the APA. The District Court for the District of Columbia held that HHS had indeed violated the APA by promulgating the PRO *Scope of Work*, contracts, and several manual transmittals without notice and comment rulemaking.[70] HHS appealed this determination to the

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[61] Medicare and Medicaid Programs; Denial of Payment for Substandard Quality Care and Review of Beneficiary Complaints, 54 Fed. Reg. 1956 (1989) (to be codified at various parts of 42 C.F.R.) (proposed Jan. 18, 1989) (proposed rule) [hereinafter PROPOSED SUBSTANDARD CARE REGULATIONS]. *See also infra* Part VI.

[62] Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980); *see also* National Ass'n of Home Health Agencies v. Schweiker, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983).

[63] American Bus Ass'n v. United States, 627 F.2d 525, 533 (D.C. Cir. 1980).

[64] New Jersey v. Department of Health & Human Servs., 670 F.2d 1262 (3rd Cir. 1981).

[65] Guardian Fed. Sav. & Loan v. Federal Sav. & Loan Ins. Corp., 589 F.2d 658, 662 (D.C. Cir. 1978).

[66] Chamber of Commerce of the United States v. OSHA, 636 F.2d 464 (D.C. Cir. 1980).

[67] 1 C.F.R. §§ 305.86-5, .87-8 (1987).

[68] Baldwin & Fackelmann, *Blizzard of Paperwork, New Rules are Burying PROs and Hospitals*, MOD. HEALTHCARE, Jan. 3, 1986, at 46, 47–48.

[69] *See* 5 U.S.C. § 553(e) (1982).

[70] American Hosp. Ass'n v. Bowen, 640 F. Supp. 453 (D.D.C. 1986). The court also held two manual transmittals to be valid interpretive rules, not subject to notice and comment rulemaking. This holding was not appealed.

District of Columbia Circuit Court of Appeals, which reversed the district court.[71] The appellate court's majority opinion, written by Judge Wald, found the contract, *Scope of Work*, and manual transmittals to have been covered by exceptions to the APA. Judge Mikva dissented in part, arguing that the challenged contract objectives should have been promulgated through APA rulemaking procedures.[72] Ultimately, Congress seems to have had the last word, as provisions of the Omnibus Budget Reconciliation Act of 1987 (OBRA '87)[73] call for publication of PRO contract provisions, though not necessarily using APA procedures. Before turning to this legislation, the rulemaking requirements of the APA in general, and the interpretation of them in *American Hospital Association v. Bowen* in particular, will be considered in greater detail.

The notice and comment and publication requirements of 5 U.S.C. section 553 are subject to a number of exceptions, several of which arguably apply to the PRO program. Most obviously, section 553 does not apply to "a matter relating to . . . public property, loans, grants, benefits or contracts."[74] As PROs assist in running a benefit program (Medicare) under contract with HHS, instructions governing the administration of the PRO program would seem to fall within this exception. This exception has been widely criticized as an atavistic survival of simpler days when government benefit programs were uncommon rather than pervasive and when the law still drew a clear line between rights and privileges.[75] The Secretary of HHS has yielded to these criticisms and voluntarily waived the protection of this exception.[76] HHS is legally bound by this waiver.[77]

In its brief in *American Hospital*, HHS argued that, even though it has generally waived the APA contract exception, the PRO statute expressly exempts PRO contracts from any APA constraints.[78] 42 U.S.C. section 1320c-2(e) provides that the Secretary's authority in making PRO contracts is not to be trammeled by "any provision of law relating to the making, performance, amendment, or modification of contracts of the United States."[79] This provision was adopted by Congress to promote flexibility and avoid restriction of "innovation in new approaches to review."[80] The D.C. Circuit, however, rejected this argument, noting that the provision exempted PRO contracting from "the vast corpus of law establishing rules regarding the procurement of contracts from the government"[81] and not from the

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[71] American Hosp. Ass'n v. Bowen, 834 F.2d 1037 (D.C. Cir. 1987).

[72] *Id.* at 1058–62 (Mikva, J., dissenting).

[73] Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 1330 [hereinafter OBRA '87].

[74] 5 U.S.C. § 553 (1982).

[75] *See* Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540 (1970); 1 C.F.R. § 305.69-8 (1987).

[76] 36 Fed. Reg. 2,532 (Feb. 5, 1971).

[77] Herron v. Heckler, 576 F. Supp. 218, 229 (N.D. Calif. 1983).

[78] Brief for Appellant at 35–39, American Hosp. Ass'n v. Bowen, 834 F.2d 1037 (D.C. Cir. 1987) (No. 86-5579).

[79] 42 U.S.C. § 1320c-2(e) (1982).

[80] S. REP. No. 494, 97th Cong., 2d Sess. 41, 43, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 817–19.

[81] *American Hosp.*, 834 F.2d at 1054.

APA. The court noted that nothing in the provision's legislative history indicated that Congress intended to retract HHS's own waiver of the APA contract exemption.[82]

Because HHS was precluded by its waiver from relying on the grants, benefits, and contracts exception in *American Hospital*, it instead relied primarily on exceptions found in 5 U.S.C. section 553(b)(3)(A) for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."[83] The law governing these exceptions to the APA is terribly obscure, described by various cases as "tenuous," "blurred," "baffling," and "enshrouded in considerable smog."[84]

In the district court, HHS argued unsuccessfully that the manual instructions were interpretive rules. Interpretive rules are provisions that "merely clarify or explain existing law or regulations."[85] They track and fine-tune statutory or regulatory requirements or remind regulated individuals or entities of existing duties,[86] elucidating what an administrative officer thinks a statute or rule means.[87] They have no independent force of law.[88]

Some provisions of the *PRO Manual*, scopes of work, and contracts merely restate and clarify statutory obligations. Examples include provisions dealing with data confidentiality or disclosure. But most provisions of the *PRO Manual* and contracts address issues not directly covered by statutes and regulations, such as review sampling and data reporting requirements, and thus cannot properly be classified as interpretive rules. The district court in *American Hospital* so held,[89] and the court of appeals affirmed.[90]

The court of appeals, however, relied on other exceptions found in 5 U.S.C. section 553 to uphold the *PRO Manual* instructions, contract, and *Scope of Work*. First, it held that several manual instructions focusing PRO review on particular objectives were validly exempt from notice and comment rulemaking because they were procedural rules, exempt under 5 U.S.C. section 553(b)(A).[91] The procedural rule exception exists to allow agencies flexibility in arranging their internal operations—"it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which parties present themselves or their viewpoints to the agency."[92] As procedural rules do not directly govern public conduct, it is argued, their formation does not require the public participation mandated by the APA.[93] In *American Hospital*, Judge Wald articulated the key test for identifying a procedural rule as "whether the agency action also encodes a substantive value judgment or puts a stamp of approval or disapproval on a given type of behavior."[94] A rule governing procedure that does not enforce such a substantive value judgment is exempt from APA rulemaking requirements, regardless of its actual impact on the rights of those affected by agency action. This interpretation expands the procedural rule exemption and is at variance with earlier authorities, which placed emphasis on whether the rule in fact had a substantial impact on substantive rights.[95]

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[82] *Id.*

[83] 5 U.S.C. § 553(b)(3)(A) (1982).

[84] *See, e.g.*, Community Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987) (and cases cited therein).

[85] Alcaraz v. Block, 746 F.2d 593, 613 (9th Cir. 1984) (quoting Powderly v. Schweiker, 704 F.2d 1092, 1098 (9th Cir. 1983)).

[86] Cabais v. Egger, 690 F.2d 234, 238 (D.C. Cir. 1982). *See* Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 393–97.

[87] American Postal Workers Union v. United States Postal Serv., 707 F.2d 548 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); In Home Health Care v. Bowen, 639 F. Supp. 1124 (D.D.C. 1986).

[88] Herron v. Heckler, 576 F. Supp. 218, 231 (N.D. Cal. 1983).

[89] American Hosp. Ass'n v. Bowen, 640 F. Supp. 453, 462–63 (D.D.C. 1986).

[90] American Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1050 (D.C. Cir. 1987).

[91] *Id.* at 1049–51.

[92] Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980) (footnote omitted); *see also* Neighborhood TV Co. v. FCC, 742 F.2d 629 (D.C. Cir. 1984); Mayton, *A Concept of a Rule and the "Substantial Impact" Test in Rulemaking*, 33 EMORY L.J. 889, 900 (1984).

Applying this definition of procedural rule, Judge Wald upheld as exempt from APA rulemaking requirements manual provisions establishing sampling procedures for targeting PRO review. This holding is consistent with other cases holding that strategies for enforcement or timing of review are procedural in nature.[96] It is, however, based on two questionable premises.

First, Judge Wald's opinion is clearly based on the proposition that PROs are, in effect, agents or extensions of HHS. If the PROs are in reality a part of HHS, the disputed manual transmittals establishing procedures to be used by the PROs in effect dictate the internal procedures of a federal agency.[97] Following this line of reasoning, Judge Wald posited that any impact of the challenged HHS directives on PROs was not relevant to the question of whether such directives had a sufficiently substantial effect to render them substantive rather than procedural rules.

PROs are, of course, federal entities for some purposes.[98] But they are also independent, private corporations, contracting to provide a service to the government.[99] If PROs are part of the federal government solely because they provide a service under contract, so are Medicare carriers and intermediaries and, for that matter, hospitals and physicians who provide services as agents of the government to the ultimate beneficiaries of the Medicare program. In fact, when HHS has engaged in notice and comment rulemaking, it has considered the impact of its rules on PROs as if they were "small entities" under the Regulatory Flexibility Act, thus recognizing their independent existence.[100]

It could be argued, of course, that the federal government should be able to deal with its contractors without being bothered by notice and comment rulemaking, and as noted earlier, the APA explicitly exempts from notice and comment rulemaking matters pertaining to government contracts. Yet, HHS has waived the protection of this exemption generally, and this waiver includes within its scope, presumably, HHS's governance of PROs as well as of hospitals. Turning again to the policies underlying the APA notice and comment requirement, PROs indisputably have an interest in participating in the process used for determining their responsibilities and have valuable information to contribute to that process. Thus, Judge Wald's conclusion that the substantive impact of HHS rules on PROs is irrelevant to a consideration of whether such rules are procedural or not is simplistic and probably wrong. The AHA may not have had standing to challenge the effect of HHS's informal policy on the PROs, but this issue is a real one.

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[93] United States Dep't of Labor v. Kast Metals Co., 744 F.2d 1145 (5th Cir. 1984).

[94] *American Hosp.*, 834 F.2d at 1047.

[95] *See, e.g.*, Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1112–13 (D.C. Cir. 1974).

[96] *See* International Union, UAW v. Brock, 783 F.2d 237, 251 n.18 (D.C. Cir. 1986); *Kast Metals*, 744 F.2d at 1145; *Neighborhood TV*, 742 F.2d at 629; Donovan v. Wollaston Alloys Inc., 695 F.2d 1, 9 (1st Cir. 1983); Davis Walker Corp. v. Blumenthal, 460 F. Supp. 283 (D.D.C. 1978).

[97] *American Hosp.*, 834 F.2d at 1048–49.

[98] *See* Kwoun v. Southeast Mo. PSRO, 811 F.2d 401, 407 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1994 (1988) (holding PSRO officials to be federal officers for application of immunity doctrine in damage action); Smith v. North La. Medical Review Ass'n, 735 F.2d 168, 173 (5th Cir. 1984) (holding PSRO to be federal rather than state entity for application of state action requirement).

[99] *See supra* notes 7–9 and accompanying text.

[100] *See* 53 Fed. Reg. 8,662 (Mar. 16, 1988).

Second, Judge Wald's opinion is also based on the notion that manual transmittals directing enforcement strategy have only a minimal impact on hospitals and other providers. Providers, of course, have no legitimate interest in freedom from effective oversight, but they may well have an interest in avoiding enforcement strategies that create excessive burdens[101] or that unfairly single out particular classes of providers.[102] Other courts have noted that enforcement strategies may have substantive effects.[103]

HHS did not take the position that its enforcement strategy was secret; indeed, HHS has described this strategy in the *PRO Manual*. Having chosen to make its enforcement strategy public, HCFA would not have suffered a great additional burden in seeking information from the public as to the wisdom of that strategy.

The court of appeals upheld the validity of the PRO *Scope of Work* and contracts under another exception to section 553, the "general statement of policy" exception. This exception to the APA is probably the most mysterious. Cases attempting to explicate it describe "general statements of policy" as akin to press releases, announcing to the public an agency's intention as to what plans and priorities it will seek to establish in the future.[104] Policy statements do not create binding norms that constrain the agency's discretion.[105] They are tentative and do not foreclose agency alternatives or conclusively affect rights.[106] Some cases exclude from this category statements having a substantial impact on substantive rights,[107] while others reject this distinction.[108] Most cases have considered the binding nature of a pronouncement to be decisive in determining whether it is a "general statement of policy" or not.[109] Policy statements that narrow the field of vision of a decisionmaker, minimizing the influence of some factors and encouraging decisive reliance on other factors that might not have been decisive had rulemaking procedures been followed, must be promulgated as rules.[110]

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[101] *Cf.* Burlington Memorial Hosp. v. Bowen, 644 F. Supp. 1020 (W.D. Wis. 1986) (considering HCFA's alleged responsibility to reimburse providers for costs of photocopying necessitated by PRO review).

[102] *See infra* text accompanying notes 169–70.

[103] Community Nutrition Inst. v. Young, 818 F.2d 943 (D.C. Cir. 1986); Estate of Smith v. Bowen, 656 F. Supp. 1093 (D. Colo. 1987).

[104] Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1013 (9th Cir. 1987); Pacific Gas & Elec. Co. v. Federal Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974).

[105] *Mada-Luna*, 813 F.2d at 1014.

[106] Batterton v. Marshall, 648 F.2d 694, 702 (D.C. Cir. 1980).

[107] W.C. v. Bowen, 807 F.2d 1502 (8th Cir. 1987); Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1112 (D.C. Cir. 1974).

[108] Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1982), *aff'd*, 472 U.S. 846 (1985). *See also* Note, *An Analysis of the General Statement of Policy Exception to Notice and Comment Procedures*, 73 GEO. L.J. 1007 (1985) (arguing for both a binding norm and substantial effect test).

Judge Wald's position that PRO scopes of work are general statements of policy is certainly plausible. They are, after all, primarily statements by HHS of what it hopes to achieve through its contracts. The court's holding that PRO contracts are mere general statements of policy, however, is more questionable. In particular, the court's argument that objectives found in the contracts are not binding upon the PROs and thus will have no substantial effect on the PRO application of standards in necessity and quality review seems highly suspect. One of the primary arguments relied on by Congress for replacing the PSRO program with the PRO program was that the PROs would be more effective in controlling utilization and quality precisely because they would be held to their contractual objectives under threat of nonrenewal.[111] In fact, some PRO contracts were not renewed after the first contract cycle because the PROs failed to meet contract objectives,[112] and HCFA's evaluation of PROs for renewal of contracts in the second cycle relies heavily on the PROs' contractually assumed review activities.[113] Indeed, when HHS has engaged in rulemaking, it has acknowledged the significant effects that review of PROs pursuant to their contracts will have on providers, practitioners, and beneficiaries.[114] It is disingenuous for HHS to say, therefore, that PRO contracts have no binding effect on the PROs and thus no impact on beneficiaries or providers.

Judge Mikva, in dissent, pointed persuasively to the analogy between the PRO contract objectives and efforts of the Social Security Administration to target its review on ALJs who granted a disproportionate number of disability awards. This effort was held earlier by the Ninth Circuit to be subject to APA rulemaking requirements because it effectively discouraged disability awards.[115] Similarly, PRO contract objectives undoubtedly have an impact on PRO payment denials, which in turn affect provider and physician behavior and, ultimately, the services received by Medicare beneficiaries.

All of this is not to say that Judge Wald's opinion reaches the wrong conclusion. If its legal foundations are questionable, its result is certainly politic. In creating the PRO program, Congress intended to establish a system that could respond rapidly, flexibly, and creatively to developments in the delivery of health services. To impose on this program the cumbersome requirements of APA notice and comment rulemaking, with its encrustation of OMB oversight, would seriously impede the implementation of this intent, as evidenced by the delay attendant to promulgation of the substandard care denial and second opinion rules mandated by COBRA '85, which have just reached the NPRM stage.[116] It would be particularly unfortunate if both the PRO scopes of work and contracts were forced to go through separate, largely redundant rulemaking proceedings that involve four separate Federal Register publications. Nevertheless, as has been pointed out, the *American Hospital* case imposes a very expansive reading on the APA exceptions and gives inadequate scope to the policies supporting notice and comment rulemaking.

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[109] *See* Community Nutrition Inst. v. Young, 818 F.2d 943, 946–48 (D.C. Cir. 1987); Telecommunications Research & Action Center v. FCC, 800 F.2d 1181, 1186 (D.C. Cir. 1986); Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986) (use of permissive or mandatory language may be decisive); American Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980).

[110] *Pickus*, 507 F.2d at 1113.

[111] *See* S. REP. No. 494, 97th Cong., 2d Sess. 41, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 781, 817; 42 U.S.C. § 1320c-2(c)(7) (1982).

[112] *Growing Contract Denials Dispirit the Nation's PROs*, HOSPITALS, May 20, 1986, at 28.

[113] OIG EFFECTIVENESS REPORT, *supra* note 9, at 21.

[114] 50 Fed. Reg. 15,322–25 (Apr. 17, 1985).

[115] W.C. v. Bowen, 807 F.2d 1502 (8th Cir. 1987).

As was stated at the outset, Congress has had the last word on this question, at least for now. Several sections of OBRA '87 attend to earlier recommendations of ACUS that HHS take a more public posture in formulating its policies governing the Medicare program.[117] Section 4035(b), for example, provides:

> (2) No rule, requirement, or other statement of policy (other than a national coverage determination) that establishes or changes a substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under this title shall take effect unless it is promulgated by the Secretary by regulation . . . .[118]

The amended statute further requires the Secretary to permit at least sixty days for public comment on rules so promulgated.[119] Under language adopted by OBRA '86, this provision does not apply when statutes require implementation of a rule with a shorter comment period or within a period of less than 150 days or when the APA good cause exception applies.[120] In effect, these provisions explicitly forbid the Secretary from revoking HHS's waiver of the APA contracts and benefits exception and bind HHS to APA rulemaking when its instructions to the PROs have substantive impact. These provisions do not, however, reverse *American Hospital*, which specifically found that the challenged provisions did not have substantive impacts. Other provisions of OBRA '87, however, do affect the *American Hospital* result.

First, section 4035(c)(1) requires HHS to publish every three months "a list of all manual instructions, interpretative rules, statements of policy, and guidelines of general applicability" that are promulgated to carry out the Medicare program but are not promulgated as rules and have not been published in an earlier list.[121] This provision assures that the public will at least be made aware of HHS instructions affecting the PRO program. More specifically relevant to PROs, section 4091 provides that "[t]he Secretary shall publish in the Federal Register any new policy or procedure adopted by the Secretary that affects substantially the performance of contract obligations under 42 U.S.C. § 1320c-2 [authorizing contracts with PROs] not less than 30 days before the date on which such policy or procedure is to take effect."[122] It further requires that "[t]he Secretary shall publish in the Federal Register the general criteria and standards used for evaluating the efficient and effective performance of [PRO] contract obligations . . . and shall provide opportunity for public comment with respect to such criteria and standards."[123]

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[116] COBRA '85, Pub. L. No. 99-272, §§ 9401, 9403, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 83, 196–200. *See supra* note 61 and *infra* Part VI.

[117] *See* 1 C.F.R. §§ 305.86-6, .87-8 (1987).

[118] OBRA '87, Pub. L. No. 100-203, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 1330, 1330-78 (to be codified at 42 U.S.C. § 1395hh(a)(2)).

[119] 42 U.S.C. § 1395hh(b)(1) (Supp. IV 1986).

[120] *Id.* § 1395hh(b)(2).

[121] OBRA '87, Pub. L. No. 100-203, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 1330, 1330-78 (to be codified at 42 U.S.C. § 1395hh(c)(1)).

These provisions make considerable progress toward solving the problem addressed by *American Hospital*. First, they support the court's conclusion that many HHS policies and procedures affecting PROs, and specifically the criteria and standards for evaluating PRO performance, are not subject to the full panoply of procedures that accompany APA rulemaking. The statute does not designate these criteria and standards as "rules" subject to the prepublication requirements of Executive Order No. 12,291 or No. 12,498 or 5 U.S.C. sections 601 through 612. Rather, it simply calls for publication of the criteria and standards in the Federal Register and for an opportunity for comment. This should significantly enhance the ability of HHS to respond flexibly to the complexity and volatility of the issues raised by the PRO program.

Second, these sections nonetheless affirm Congress' commitment to the principles that undergird notice and comment rulemaking. HHS should interpret these provisions liberally to honor this commitment. In particular, HHS should construe the amendments to require publication for comments of proposed scopes of work. The scope of work is the most basic document used to evaluate contract proposals and is thus ultimately used to judge contract performance. Even though scopes of work are arguably, as the D.C. Circuit held, statements of policy rather than rules, they have a substantial effect on the PRO program and should be promulgated pursuant to notice and comment procedures.

Drafts of proposed scopes of work have in the past apparently been leaked to interested parties before publication. Indeed, a notice of the availability of the *Second Scope of Work* was published in the Federal Register, and HHS received comments on it.[124] HHS would suffer no significant additional burden in sharing them with the public generally for comments. With the PRO contract cycle expanded to three years, HHS should find that it has ample time to publish proposed scopes of work for comment.

In accordance with the requirements of OBRA '87, HCFA published a summary of the *Third Scope of Work* as a notice in the Federal Register on September 12, 1988.[125] This summary was only published, however, after contracts were already being negotiated to implement the *Third Scope of Work*. Moreover, HCFA did not solicit comments on it. While publication of the summary is a positive step, HCFA should do more to involve interested parties in the process of devising scopes of work.

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[122] *Id.* at 1330-134 (to be codified at 42 U.S.C. § 1320c-2). This paragraph, like the provisions relating to regulations mentioned above, does not apply when inconsistent with a statutory deadline.

[123] *Id.*

[124] 50 Fed. Reg. 46,702 (Nov. 12, 1985) (comments due by Nov. 27, 1985).

[125] 53 Fed. Reg. 35.234 (Sept. 12, 1988).

Third, these statutes clarify the status of PROs in their relationship to HHS. The statutes reject Judge Wald's position that PROs are mere tools of the federal government, no more entitled to an opportunity to participate in policymaking than a low level government employee. They recognize rather the quasi-independent nature of PROs and their right to notice and an opportunity to comment on the criteria under which their performance will be evaluated and to some notice before changes are made in their contract obligations.[126]

Fourth, these provisions focus on the appropriate level for public participation in policymaking. HHS is required to publish policies and procedures "substantially" affecting performance of contract obligations and "general" criteria and standards. The public should be made aware of and allowed to participate in the formulation of broad policy; the minutiae, however, should be left to HHS. In particular, this language should be understood not to require publication of individual contracts. The intention of Congress in establishing the PRO program, evidenced in 42 U.S.C. section 1320c-2, was to run the program through bid contracts. It is difficult to conceive of how competitively bid contracts can be subjected to notice and comment rulemaking. Moreover, if a scope of work has been run through the notice and comment process, there is little need for individual contracts, which reflect the scope of work, to be run through a similar process. Despite arguments made earlier that the PRO contracts resemble legislative rules, the result arrived at by a combination of the *American Hospital* decision and the OBRA '87 requirements—that the scopes of work be published for notice and comment rulemaking, but contracts need not be—seems the most workable result.

Finally, the provisions requiring notice and comment proceedings are rendered inapplicable when they conflict with statutory deadlines. Thus, they withhold from HHS any excuse for further foot-dragging in complying with statutory mandates.

IV. Issues Concerning PRO Criteria, Norms, and Standards

The previous Part considered the rules under which HHS governs the PRO program. Each PRO, however, also has its own "rules," by which it governs the providers, physicians, and beneficiaries under its jurisdiction. Among the most important of these are the criteria, norms, and standards reviewers use to identify utilization or quality problems.

The concepts of criteria and norms have evolved over time. The initial vision of the PSRO program was that PSROs would develop objective norms against which the performance of providers and physicians could be reviewed. To quote from the legislative history:

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[126] *See* OIG Effectiveness Report, *supra* note 9, at iii, v (concurring with the need for this change).

> The review process would be made more sophisticated through the use of professionally developed regional norms of diagnosis and care as guidelines for review activities, as opposed to the present usage of arbitrarily determined checkpoints. The present review process, without such norms, becomes a long series of episodic case-by-case analyses on a subjective basis which fail to take into account in a systematic fashion the experience gained through past reviews or to sufficiently emphasize general findings about the pattern of care provided.[127]

Such regional norms, under the original PSRO legislation, were to be informed by national norms developed by a National Professional Standards Review Council. The goal was to develop objective standards of care accepted nationally.[128]

Though the dream of objective national standards for evaluating the quality and effectiveness of medical care continues to inspire scholars,[129] and remains high on the research agenda of HHS,[130] PROs have reconciled themselves to the real world where such ideal standards do not generally exist.

To function in such a world, PROs use two kinds of norms for evaluating care. First, they use written screening criteria, applied by nonphysician professional record reviewers (usually nurses), to identify potential quality and utilization problems. All PROs must use utilization, quality, and discharge screens.[131] PROs must use HHS generic quality screens for evaluating quality problems.[132] These screens look for problems such as death during or following surgery, nosocomial infection, trauma suffered in the hospital, or discharge of a patient with an inappropriately elevated temperature, high blood pressure, or depressed pulse.[133] PROs are also to apply their own criteria screens to identify premature discharges, unnecessary admissions, inappropriate performance of invasive procedures, and, for PPS hospitals, improper assignment of DRGs.[134] Most PROs, including all but one of the PROs with which I spoke, use an adapted version of the ISD-A[135] criteria developed by InterQual for making medical necessity and appropriateness determinations.[136] This system considers the intensity of services delivered to patients, the severity of the patient's condition, the patient's stability at discharge, and the use of special care units and clinical support services to determine the necessity and appropriateness of care.[137]

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[127] SENATE COMM. ON FIN., S. REP. No. 1230, 92d Cong., 2d Sess. 257 (Sept. 26, 1972).

[128] *See* Chenen, *PROs and Poor Quality Medical Care—They Can't Sanction It Until They Define It!*, 2 MED. STAFF COUNS. 25 (Spring 1988).

[129] *See, e.g.*, Dubois & Brook, *Assessing Clinical Decision Making: Is the Ideal System Feasible?*, 25 INQUIRY 59 (Spring 1988); Eddy & Billings, *The Quality of Medical Evidence: Implications for Quality of Care*, 7 HEALTH AFF. 19, 29–30 (Spring 1988); Wennberg, *Improving the Medical Decision-Making Process*, 7 HEALTH AFF. 99 (Spring 1988).

[130] GAO, *supra* note 31, at 144–56.

[131] THIRD SCOPE OF WORK, *supra* note 3, § XIII, at 27–29.

[132] *Id.*, Attach. 1.

[133] *Id.* (Generic Quality Screens, Hospital Inpatient).

[134] *Id.* § IV, at 3–5.

[135] Intensity, severity, diagnosis—appropriateness.

[136] *See* AMA, PEER REVIEW ORGANIZATION (PRO EXECUTIVE) SURVEY Table 8 (1987) [hereinafter AMA PRO EXECUTIVE SURVEY]; GAO, *supra* note 31, at 46–51. For an example of PRO screening criteria, see Black, *Impact of PROs on Hospitals and Pharmacy Practice*, 44 AM. J. HOSP. PHARMACY 77, 79 (Jan. 1987).

[137] PROSPECTIVE PAYMENT ASSESSMENT COMM'N, A STUDY OF THE PREADMISSION REVIEW PROCESS 1–2 (Dec. 1987).

Second, once problems are identified by nurse reviewers, physician reviewers apply their own judgment, using implicit unarticulated standards, to evaluate the quality or necessity of the care rendered.[138] It is ultimately on the basis of these judgments that PROs deny payment to or sanction providers. Because of the potential subjectivity of this system, PROs rely heavily on repetitive review to assure accuracy and fairness. An AMA survey, for example, determined that, depending on the PRO, between three and thirty-five physicians will review a case before an initial sanction letter is sent. The mean number of reviewers was ten; the median was seven.[139] Thus, although PROs do not apply written criteria in making their final decisions, they do seek a consensus medical judgment that transcends the subjective judgment of individual reviewers.

The concepts of criteria, norms, and standards are defined in the PRO statute and regulations. 42 U.S.C. section 1320c-3(a)(6) mandates that PROs:

> shall . . . apply professionally developed norms of care, diagnosis, and treatment based upon typical patterns of practice within the geographic area served by the organization as principal points of evaluation and review, taking into consideration national norms where appropriate. Such norms with respect to treatment for particular illnesses or health conditions shall include—(i) the types and extent of health care services, which, taking into account differing, but acceptable, modes of treatment and methods of organizing and delivering care, are considered within the range of appropriate diagnosis and treatment of such illness or health condition, consistent with professionally recognized and accepted patterns of care; and (ii) the type of health care facility which is considered, consistent with such standards, to be the type in which health care services which are medically appropriate for such illness or condition can most economically be provided.[140]

While the PRO statute speaks only of norms, implicit in it is the distinction made by the current PRO regulations among criteria, norms, and standards. Norms are defined as "numerical or statistical measures of average observed performance in the delivery of health care services."[141] Criteria are "predetermined elements of health care, developed by health professionals relying on professional expertise, prior experience, and the professional literature, with which aspects of quality, medical necessity, and appropriateness of a health care service may be compared."[142] Standards are defined as "[p]rofessionally developed expressions of the range of acceptable variation from a norm or criterion."[143] In short, norms represent the real, criteria the ideal, and standards the acceptable deviations from either the real or the ideal.[144]

This neat distinction among norms, standards, and criteria becomes blurred in section 466.100, which delineates the use of norms, criteria, and standards. First, section 466.100(c) requires PROs to "[e]stablish written criteria based upon typical patterns of practice in the PRO area, or use national criteria where appropriate."[145] Typical practice patterns, of course, should be reflected in norms, not criteria, given the definitions of the regulations. Section 466.100(a) requires use of "national, or where appropriate, regional norms in conducting review to achieve PRO contract objectives."[146] Section 466.100(b) requires the use of criteria to review patient care in health facilities to determine the necessity of admission, of continuing stay for day outliers,[147] or of surgical and other invasive diagnostic and therapeutic procedures, and to determine the appropriateness of providing care in particular types of facilities. Finally, section 466.100(d) permits the use of variant criteria and standards to evaluate care in particular locations and facilities if the patterns of practice in them are substantially different from practice in the rest of the PRO area and there is a reasonable basis for the variation.

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[138] The term "standards" is used in a generic rather than a technical sense, as defined below (*see infra* text accompanying notes 141–44).

[139] *See* AMA PRO Executive Survey, *supra* note 136, Table 11.

[140] 42 U.S.C. § 1320c-3(a)(6) (1982).

[141] 42 C.F.R. § 466.1 (1987).

[142] *Id.*

[143] *Id.*

[144] *See* A. Gosfield, PSRO's: The Law and the Health Consumer 34–35 (1975) (further exploring this distinction).

Amendments to the PRO regulations proposed on March 16, 1988, will modify the rules in three important respects. First, they make it clear that norms are used by nonphysician health care professionals, who screen medical records and refer cases that fail the screens to physicians for a final determination. Second, they specify that criteria are to be used for reviewing for the quality as well as the necessity and appropriateness of norms. Finally, they eliminate the notion of standards (that is, acceptable deviations from norms and criteria), noting that PROs in fact have not adopted standards.[148]

Several important issues have arisen concerning the application of PRO norms and criteria. First, a continuing dispute exists as to whether the norms and criteria applied by PROs are sufficiently definite to give adequate notice to those who are sanctioned or denied payment by the PROs. Second, differences of opinion exist as to what extent local or regional practice variations should be accommodated by PRO norms. Third, there is controversy as to what extent PRO utilization norms should accommodate social, as opposed to medical, needs for care. Finally, debate continues as to what processes should be used to assure the participation of relevant parties in the formation of PRO norms and to make final norms available to such parties.

A. *Are PRO Norms and Criteria Sufficiently Definite?*

Administrative law has long struggled with the question of whether standards must be prospectively articulated with precision before they can be enforced. There is much to be said for administrative agencies governing through precise and objective written rules. Objective written standards provide guidance to the regulated agencies in planning conduct and thus assure greater voluntary compliance with requirements. They also focus and facilitate judicial and political review and generally cabin administrative discretion.[149] ACUS has long supported prospective articulation of agency policies.[150] Courts have on occasion struck down agency actions wholly unfettered by written standards.[151]

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[145] 42 C.F.R. § 466.100(c) (1987).

[146] It further specifically requires the use of national norms to determine the number of procedures selected for preadmission review, a requirement that would be omitted by the proposed regulations, as it does not reflect current PRO practice. *See* proposed rule § 466.100, 53 Fed. Reg. 8,660, 8,666 (Mar. 16, 1988).

[147] Outliers are patients who require hospitalization for periods of time significantly longer than those contemplated by PPS and for whom hospitals receive extra reimbursement.

[148] 53 Fed. Reg. 8,654, 8,660, 8,666 (Mar. 16, 1988).

Formulating precise and objective rules, however, may place inordinate demands on agency resources and may result in rules that are too complicated or that are over- or under-inclusive.[152] The Supreme Court has on several occasions permitted agencies to make policy on a case-by-case basis rather than through prospective rulemaking.[153] And courts have been notably reluctant to strike down standards propounded by agencies as unconstitutionally vague, at least when neither first amendment rights nor criminal prosecutions were involved.[154] This is particularly true where industry or professional practice assists in understanding an imprecise rule.[155]

The federal statute and regulations defining conduct sanctionable under the PRO program are remarkably imprecise. 42 U.S.C. section 1320c-5, for example, provides that practitioners or providers have an obligation to assure that services "(1) will be provided economically and only when, and to the extent, medically necessary; and (2) will be of a quality which meets professionally recognized standards of health care."[156] Practitioners or providers may be sanctioned if they fail "in a substantial number of cases substantially to comply" or in one or more instances "grossly and flagrantly" violate these obligations.[157] The PRO regulations further define "gross and flagrant violation" to mean "[a] violation of an obligation [that] has occurred in one or more instances which presents an imminent danger to the health, safety or well-being of a Medicare beneficiary or places the beneficiary unnecessarily in high-risk situations."[158] "Substantial violation in a substantial number of cases" is defined as "a pattern of care [that] has been provided that is inappropriate, unnecessary, or does not meet recognized professional standards of care, or is not supported by the necessary documentation of care as required by the PRO."[159] These federal standards are fleshed out through objective screening criteria and subjective reviewer judgments at the PRO level.

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149. Diver, *Agency Articulation of Policy*, 1983 ADMIN. CONF. OF THE UNITED STATES 390–91; Berg, *Reexamining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149, 163 (1986).

150. See 1 C.F.R. § 305.71-3 and other ACUS recommendations cited by Diver, *supra* note 149, at 389–90.

151. Morton v. Ruiz, 415 U.S. 199 (1974); D & W Food Center v. Block, 786 F.2d 751, 757 (6th Cir. 1986); White v. Roughton, 530 F.2d 750 (7th Cir. 1976); Holmes v. New York City Housing Auth., 398 F.2d 262 (2d Cir. 1968).

152. Diver, *supra* note 149, at 397–98, 505–06, 508–09.

153. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); NLRB v. Wyman Gordon Co., 394 U.S. 759 (1969). *See also* Scalia, *Back to Basics: Making Law Without Making Rules*, 5 REGULATION 25 (July/Aug. 1981).

154. United States v. Sun Sport Imports Ltd., 725 F.2d 184 (2d Cir. 1984); Vorbeck v. Schnicker, 660 F.2d 1260 (8th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982). *See* Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982).

155. PBR Inc. v. Secretary of Labor, 643 F.2d 890 (1st Cir. 1981); Brass Plating Co. v. Town of Windsor, 639 F. Supp. 873 (D. Conn. 1986).

156. 42 U.S.C. § 1320c-5(a)(1)–(2) (1982). The section further requires that providers and practitioners be able to supply evidence of the necessity and quality of services provided.

157. *Id.* § 1320c-5(b)(1)(A), (B).

158. *Id.*

159. 42 C.F.R. § 1004.1 (1987).

The federal PRO statute and regulations have been upheld repeatedly against vagueness challenges.[160] The Fourth Circuit in *Varandani v. Bowen* noted: "The definition of adequate medical care cannot be boiled down to a precise mathematical formula; it must be grounded in what, from time to time, other health professionals consider to be acceptable standards of health care."[161] The First Circuit Court of Appeals in *Doyle v. Bowen* further noted that "[t]o the medical profession, which will administer this [federal] standard, it has a reasonably clear meaning."[162]

Nonetheless, physicians sanctioned under the Medicare program, and many of the provider attorneys with whom I spoke, have complained about the lack of precision in PRO criteria for evaluating the necessity and quality of medical care.[163] While ALJs hearing PRO sanction cases have not rejected PRO sanctions solely because of the imprecision of PRO standards, they have called for more objective, clear, and appropriate standards.[164] On the other hand, some provider associations that I interviewed expressed continuing concern about reducing the practice of medicine to a "cookbook," which ignores the art necessarily involved in medical practice.[165] Devising a definitive and precise formula for evaluating medical practice may be an impossible dream in any event—a recent article that proposed use of Bayesian analysis for devising criteria maps for analyzing patient diagnosis noted that a complete system would include over ten billion pathways of analysis for common medical problems.[166] Some room must be left for informed judgment.

HHS and the PROs continue to attempt to devise more objective criteria for evaluating the effectiveness and quality of medical care. The generic screening criteria uniformly used by the PROs represent one such attempt. Reviews of these criteria are generally positive.[167] HHS has also proposed that more explicit criteria be developed for particular conditions before the denial of payment for substandard care program, mandated by COBRA '85, is implemented.[168] At the PRO level, the

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[160] Doyle v. Bowen, 848 F.2d 296, 301 (1st Cir. 1988); Varandani v. Bowen, 824 F.2d 307, 311–12 (4th Cir. 1987); Association of Am. Physicians & Surgeons v. Weinberger, 395 F. Supp. 125, 138 (N.D. Ill. 1975).

[161] *Varandani*, 824 F.2d at 312.

[162] *Doyle*, 848 F.2d at 301; *see also In re* Lifshutz, No. 000-44-7020, 11–13 (Mar. 25, 1988) (ALJ opinion holding that PROs need not apply written criteria, norms, and standards in sanctioning physician).

[163] The interviews conducted by the author were generally carried out under an understanding that the identity of interviewees would be kept confidential, so interviewees are not identified here. For published statements to the same effect, see generally Chenen, *supra* note 128; *Hearings on the Peer Review Organization Program Before the Subcomm. on Health and the Env't of the House Energy & Commerce Comm.*, 100th Cong., 1st Sess. 7–9 (1987) (statement of AHA).

[164] *In re* Greene, No. HIX-000-00-0219, 8–20 (Dec. 29, 1987); *In re* Apakupakul, No. HIX-000-34-7009, 32–33 (June 1, 1987) (charges too vague).

[165] *See Interpreting PSRO "Norms of Care"—Cookbook Medicine or Textbook Medicine?*, Am. Med. News, May 20, 1974, at 21; *PROs, Medical Societies Must Play a Role*, The Internist, Apr. 1985, at 9.

[166] Dubois & Brook, *supra* note 129, at 63.

[167] *See* Office of Inspector General, U.S. Dep't of Health & Human Servs., The Utilization and Quality Control Peer Review Organization (PRO) Program, Quality Review Activities 12 (1988) [hereinafter OIG Quality Report]; Slide Presentation on Quality Assurance, Ernst & Whinney, Slide K-18 (1987 survey results).

[168] Health Care Fin. Admin., U.S. Dep't of Health & Human Servs., Regulations on Denial of Payment for Substandard Quality Care (draft) A12–13 (Feb. 29, 1988) [hereinafter HCFA Regulations]; Proposed Substandard Care Regulations, *supra* note 61, at 1958–59, 1963 (to be codified at 42 C.F.R. pt. 462, § 466.100(c) (establishment of criteria and standards)).

Pennsylvania PRO has been experimenting with computerizing its screening criteria, which presumably would require greater precision.

HHS and the PROs should continue to press forward toward formulating more objective and precise necessity and quality criteria when it is possible to do so with the support of scientific evidence and the consensus of the medical community. Until such criteria become feasible, however, the program will continue to have to live with relatively imprecise criteria that are applied to individual cases through the judgment of physician reviewers.

B. *Local or National Norms*

One of the most politically controversial issues affecting the PROs has been whether norms and criteria used for evaluating medical care should be national in scope or whether local practice variations should be accommodated. From 1985 to 1987, 63% of physicians recommended by PROs for sanctions and 65% of the physicians sanctioned by the OIG were from rural areas, despite the fact that only 11% of physicians in the United States practice in rural areas.[169] While there is no consensus as to why this has been true, it has clearly raised the ire of rural practitioners and their patients, who believe that rural physicians are sanctioned disproportionately because PROs depend on reviewers from urban areas who do not understand the practice of medicine in rural areas.[170]

It has long been known that there are substantial variations in medical practice between different communities,[171] a fact recognized, at least intuitively, in the old malpractice locality rule. On the other hand, there is a certain plausibility to the argument (which has largely won the day in malpractice litigation) that local standards often reflect poor quality care and that a national standard, adjusted for local variations in access to medical resources, is more appropriate. A broken hip or heart attack in rural Texas is, after all, physiologically identical to one in Boston.[172]

From the beginning, the PRO statute recognized that there may be local or regional variations in acceptable norms of treatment and that the PROs should take these into account. The PRO regulations permit the use of variant norms to accommodate local variations in practice.[173] PRO Interim Manual Transmittal IM-87-1[174] requires PROs, whenever possible, to use physician reviewers who practice in settings similar to that of the physician under review and specifically to use rural physicians to review the work of rural physicians.[175] At least one court has determined that a physician who argued that a PRO must use rural standards in sanctioning a rural physician raised a sufficiently substantial question to secure a preliminary injunction.[176] This interpretation of the PRO legislation was followed by the ALJ in that case on remand.[177] Finally, OBRA '87 further accommodates local practice variations by requiring PRO consideration of the "special problems associated with delivering care in remote rural areas"[178] and by mandating on-site review of at least 20% of the rural hospitals in a PRO's area.[179]

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[169] OIG SANCTION REPORT, *supra* note 6, App. XI, Table D. *See id.* at 20 (speculating as to the reasons for this).

[170] *See Hearings on Peer Review Organizations, Health and the Env't Subcomm. of the House Energy and Commerce Comm.*, 100th Cong., 1st Sess. 30 (1987) (statement of Rep. Boulter); Reinhold, *Quality-Care Reviews Hurting Rural Doctors*, N.Y. Times, Mar. 24, 1987, at A1, col. 3.

[171] Wennberg, *Dealing with Medical Practice Variations: A Proposal for Action*, 3 HEALTH AFF. 6 (Summer 1984).

[172] *See* Hall v. Hilbun, 466 So. 2d 856 (Miss. 1985); Letter from John C. Rother, for the Am. Ass'n of Retired Persons, to William Roper, Administrator, HCFA, at 5 (May 16, 1988) (commenting on March 16, 1988, proposed PRO regulations) ("AARP firmly believes that the standard of care must not change from location to location, although allowance may be made for resource availability.").

[173] 42 C.F.R. § 466.100(d) (1987).

[174] PRO MANUAL, *supra* note 53, § 3015 (Apr. 1987).

In practice, PROs are increasingly sensitive to the concerns of rural practitioners. None of the PROs I interviewed had special criteria sets for regional areas, but all tried to use rural reviewers for rural providers and physicians. The OIG sanction activity investigation found that 63% of those interviewed believed there was no bias against rural physicians and providers in PRO quality review activities.[180]

While substantial political and, perhaps, medical arguments can be made both for and against the use of local or national standards, little can be said about the issue from an administrative law perspective. One point, however, should be made (and here this Article briefly gets ahead of itself). OBRA '87 provides that before HHS can exclude a provider or practitioner located in a rural health manpower shortage area or in a county with a population of less than 70,000 from the Medicare program, the provider or practitioner must be afforded a hearing, at which HHS must prove by a preponderance of the evidence that the provider or practitioner will pose a serious risk to beneficiaries if allowed to continue in the program.[181] As of late October 1988 three exclusions appealed under this procedure had been stayed (two by consent of the OIG), and two others remained pending.[182] None of the contested cases has been decided within forty-five days. Thus, prehearing exclusions of rural practitioners from the program have effectively halted.

The appropriate procedure for sanctioning physicians or providers is an important issue and will be discussed below. Whatever procedure is appropriate, however, fundamental constitutional notions of equal protection and administrative law principles of fairness demand that the same procedure be applied both to rural and urban practitioners. There are arguments, of course, for applying more favorable procedures in rural areas: there is the charge of PRO bias against rural practitioners and the concern that beneficiaries in rural areas may have no alternatives if the sole provider or practitioner in the area is excluded from the Medicare program. But the charge of bias has been generally rejected, and potential bias problems can be addressed through less drastic means, such as requiring the use of rural physicians to review care delivered in rural areas. The OIG already considers "the availability of alternative sources of services in the community"[183] in determining whether or not to exclude a provider or practitioner. Neither problem is serious enough to justify supplying rural practitioners and providers with radically different procedural protections than those offered others.[184] Congress, therefore, should repeal this provision.

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[175] Proposed rule § 466.98 also adopts this policy. 53 Fed. Reg. 6,665 (Mar. 16, 1988). A recent GAO report found that only about half of PRO reviews of cases handled by rural physicians were in fact reviewed by rural practitioners at the initial review stage. GAO, MEDICARE PROs: EXTREME VARIATIONS IN ORGANIZATIONAL STRUCTURE AND ACTIVITIES 21 (1988) [hereinafter GAO MEDICARE PROs].

[176] Greene v. Bowen, 639 F. Supp. 554 (E.D. Cal. 1986).

[177] *In re* Greene, No. HIX-000-00-0219, at 15, 20 (Dec. 29, 1987).

[178] OBRA '87, Pub. L. No. 100-203, § 4094(a), 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 1330, 1330-136.

[179] *Id.* § 4094(b), 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 1330, 1330-137.

[180] OIG SANCTION REPORT, *supra* note 6, at 19.

[181] 42 U.S.C. § 1320c-5(b)(5) (1982).

[182] Telephone interview with William Libercci, Office of Inspector General, U.S. Dep't of Health & Human Servs. (Oct. 31, 1988).

C. *Consideration of Social Criteria*

One of the major tasks of the PRO program is "appropriateness" review—determining whether care provided on an inpatient basis could have been provided more appropriately through less expensive outpatient treatment.[185] A procedure generally appropriate for outpatient care considering only medical factors may in a particular case be inappropriate because of the social characteristics of the patient or situation. One interviewee, for example, recounted the experience of a patient who traveled from her home in rural North Dakota several hundred miles to Minneapolis to be hospitalized for a medical procedure, only to be told on arrival that she would have to leave the hospital immediately after the procedure was done because the PRO would only permit it to be done on an outpatient basis.[186] Section 4094(a) of OBRA '87 provides that PROs:

> shall take into account the special problems associated with delivering care in remote rural areas, the availability of service alternatives to inpatient hospitalization and other appropriate factors (such as the distance from a patient's residence to the site of care, family support, availability of proximate alternative sites of care, and the patient's ability to carry out necessary or prescribed self-care regimens) that could adversely affect the safety or effectiveness of treatment provided on an outpatient basis.[187]

While there are substantial arguments for the consideration of social factors in determining the appropriateness of outpatient care (or, for that matter, in determining the appropriateness of hospital discharges), implementation of this provision will obviously result in more inpatient care and, thus, higher expenditures for the Medicare program. Whether such added expenditures are justified is a policy question, not a question of administrative law. HCFA implementation of this provision, however, does raise an important administrative law issue.

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[183] 42 C.F.R. § 1004.80(e) (1987).

[184] The Hall Amendment's origin in the frustration with and anger toward the Inspector General felt by some physicians is well illustrated by remarks of its drafter, Rep. Hall, responding to the first use of the procedure to stay an exclusion:

> This is one of the first judicial victories and should indicate to the inspector general, Richard Kusserow, that he can't sit over there in his ivory castle and make all types of blustery and bragging and misleading speeches; that while he can talk down to men and women who come before him and have heretofore been at his mercy—that there are many Members of Congress who are neither interested in nor impressed by his pomposity.
>
> Even physicians have a right to due process—and in the short 120 days you have left—Mr. Kusserow—I suggest you try to get acquainted with this fact, and never again try to deny any American due process!

134 CONG. REC. E2803–04 (daily ed. Aug. 11, 1988) (extension of remarks by Rep. Hall).

[185] 42 U.S.C. § 1320c-3(a)(1)(C) (1982).

[186] *See also Hearings on Medicare Peer Review Orgs., Subcomm. on Health and the Env't, House Energy and Commerce Comm.*, 100th Cong., 1st Sess. 12–15 (1987) (statement of Vita Ostrander, AARP) [hereinafter AARP Statement].

[187] OBRA '87, Pub. L. No. 100-203, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 1330, 1330-136.

In implementing OBRA '87, HCFA initially took the position that the first comma in the section quoted above should be read as a colon, that is, that the provision only applied to remote rural areas. This is not only contrary to the amendment's clear language, but is also contradicted by the legislative history of the provision, which clearly states that beneficiary location in a remote rural area is only one of the social factors to be taken into account.[188] HHS is apparently reconsidering its position on its interpretation of section 4094(a) and should expeditiously implement it as written.[189]

D. *Formulation and Publication of Criteria and Standards*

As has already been briefly noted, the D.C. Circuit held in *Public Citizen Health Research Group v. DHEW* that PSROs were not agencies within the meaning of the FOIA.[190] Because the FOIA adopts the APA definition of "agency," that decision also stands for the proposition that PROs are not agencies under the APA and thus not subject to the rulemaking requirements of 5 U.S.C. section 553. Although the reasoning of the court in *Public Citizen* is somewhat confused (the court held both that the PSRO did not have independent decisionmaking authority and that it was not subject to supervision by HHS),[191] its holding seems consistent with congressional intent that PROs are to be independent bodies of practicing physicians and not government agencies.[192] The holding is also consistent with other cases that have considered the status of PSROs and PROs.[193] PROs are also probably not subject to the Model State APA, which describes an agency as "a board, commission, department, officer, or other administrative unit of this state."[194]

Even though PROs are themselves not bound by the rulemaking requirements of the APA, the reasoning behind those requirements[195] argues in favor of PROs seeking participation of affected parties in formulating criteria, standards, and norms and assuring that their criteria, standards, and norms are made available to those affected by them. This is recognized by the documents governing the PRO program. The *Third Scope of Work* requires that:

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[188] H.R. Conf. Rep. to Accompany the Omnibus Budget Reconciliation Act of 1987, 100th Cong., 1st Sess. 661, 663.

[189] Several beneficiary representatives with whom I spoke also argued for greater consideration of social criteria in determining appropriateness of discharge. This is, however, a policy and not an administrative law issue, and it is thus beyond the scope of this Article.

[190] 668 F.2d 537 (D.C. Cir. 1981).

[191] *Id.* at 543–44.

[192] *See id.* at 542–43.

[193] *See* Oster v. Bowen, 682 F. Supp. 853 (E.D. Va. 1988); Kwoun v. Southeast Mo. PSRO, 663 F. Supp. 520 (D.C. Mo. 1985); Taylor v. Flint Osteopathic Hosp., 561 F. Supp. 1152 (E.D. Mich. 1983).

[194] Model State Admin. Procedure Act § 1-102(1) (1981).

[195] *See supra* Part III for discussion.

> In the development/refinement of criteria, the PRO shall consult with physicians/practitioners actively engaged in practice in the state. PRO developed criteria are to be submitted to HCFA for review, and sent to the providers and physician organizations (i.e., State medical societies) in the State. In addition, the contractor must furnish the criteria to anyone upon request.[196]

The PRO regulations also require that a PRO must disclose "[t]he norms, criteria, and standards it uses for initial screening of cases, and for other review activities."[197]

All of the PROs with which I spoke attempt to involve their state medical community in drafting or modifying their criteria sets. Most PROs seek comments from state medical associations and specialty societies; some circulate drafts to hospital medical staffs or have provider advisory committees. Seventy-three percent of state medical societies reported in an AMA survey that state specialty societies had assisted PROs in developing or modifying criteria, and 39% reported that specialty sections of the state medical society had also provided assistance.[198] The possibility of PROs involving their own state medical community in drafting and reviewing PRO criteria is one of the strongest arguments against the creation of uniform national criteria sets by HCFA.

All of the PROs that I interviewed are also making efforts to publicize their criteria. All send their criteria sets to every hospital in the state. Some have identified PRO liaisons in the hospitals to whom they direct the criteria, others send them to the director of the medical staff, the administrator, or the utilization review/quality assurance supervisor. Most also send them to the state medical society. None sends its criteria to all physicians in the state, though some send out a regular bulletin or newsletter to advise doctors of criteria changes or send specialty criteria to affected specialists. Nevertheless, several state provider representatives with whom I spoke said that providers are not sufficiently educated by the PROs as to PRO criteria.[199] National provider and beneficiary groups have also called for clearer and more public articulation of criteria.[200]

The task of formulating PRO criteria is ideally suited for a simplified version of negotiated rulemaking.[201] The parties affected by criteria are relatively few, and their spokespersons are readily identifiable; technical rather than ideological issues are usually (though not always) involved; the adoption of some criteria is usually necessary and inevitable; and opportunities for compromise and consensus are usually present.[202] Greater involvement of providers and practitioners in the standard-setting process could bring greater understanding of the standards and compliance with them, acceptance of the legitimacy of PRO review, and, most importantly, better standards. Greater involvement of beneficiary organizations would assure that the patient's perspective on care was taken into account, especially when social issues are involved. Dissemination of norms to beneficiaries could also play a valuable educative role.[203] PROs establishing or modifying criteria should, therefore, convene groups of provider and beneficiary organizations and attempt to reach agreement as to appropriate criteria through a negotiating process. Such an approach to criteria setting is in the best tradition of peer review.

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[196] THIRD SCOPE OF WORK, *supra* note 3, § XIII, at 27–28.

[197] 42 C.F.R. § 476.120(a)(1) (1987). PROs must also make available to the public copies of their contracts (which describe their procedures) and copies of documents describing their administrative procedures. *Id.* § 476.120(a)(2)–(3).

[198] AMA PRO EXECUTIVE SURVEY, *supra* note 136, at 2.

[199] A recent study by the GAO provides more information on how PROs disseminate their criteria. *See generally* GAO MEDICARE PROs, *supra* note 175.

[200] *See Hearings on Medicare PROs Before Subcomm. on Health and the Env't, House Comm. of Energy and Commerce*, 100th Cong., 1st Sess. 7–11 (1987) (statement of AHA); *Information for Consumers About Quality of Medical Care. Subcomm. on Natural Resources, Research, and Env't, House Comm. on Science, Space and Tech.*, 100th Cong., 2nd Sess. 10 (1988) (statement of AARP); AARP Statement, *supra* note 186, at 4.

[201] *See* Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982); Perritt, *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625 (1986); 1 C.F.R. §§ 305.82-4, .85-5 (1987).

Two provisions of OBRA '87 have the potential to make an important contribution to the task of educating the medical community about PRO criteria and norms. Section 4094(c)(1)(B)(i) requires PROs to offer to make available a physician to meet with the medical and administrative staff of each hospital to explain the organization's review of the hospital's services (at individual hospitals or on a regional basis).[204] Section 4094(c)(1)(B)(ii) requires PROs to publish at least annually and distribute to practitioners and providers a report describing the types of cases in which the PRO has frequently determined that care has been provided inappropriately, unnecessarily, or not in conformity with professional standards of care.[205] These provisions are implemented by the *Third Scope of Work*, which also requires PROs to engage in further efforts at provider education, including making staff available for educational presentations, and publications describing PRO procedures.[206] Educational efforts that involve direct discussions with affected providers and practitioners and focus on particular problem areas have great promise for effectively communicating PRO criteria.

V. The PRO Quality Assurance and Sanction Program

A. *Introduction*

By far the most controversial function of the PRO program has been its sanctioning authority. 42 U.S.C. section 1320-5(a) imposes on practitioners and providers participating in the Medicare program an obligation to assure that services they render are provided economically, are provided only when medically necessary, and are of a quality that meets professional standards of care. It further obligates them to provide evidence to establish that they have met these requirements. It also gives PROs the power and responsibility to sanction providers who fail to fulfill these obligations. If "after reasonable notice and opportunity for discussion" a PRO determines that practitioners or providers have "(A) failed in a substantial number of cases substantially to comply" with these obligations or "(B) grossly and flagrantly violated any such obligation in one or more instances,'' the PRO shall submit a report and sanction recommendation to the HHS OIG.[207] If the OIG agrees with the PRO recommendation and determines that the practitioner or provider ''has demonstrated an unwillingness or a lack of ability substantially to comply with such obligations,'' it may exclude the provider or practitioner from ''eligibility to provide Medicare services on a reimbursable basis.''[208] When the provider or practitioner has been sanctioned for providing medically improper or unnecessary care, the OIG may, instead of exclusion, impose a monetary penalty not in excess of the cost of the medically improper or unnecessary services.[209] A sanctioned provider or practitioner may obtain a post-exclusion hearing before an ALJ and, ultimately, judicial review. As was discussed earlier, under OBRA '87 rural providers cannot be excluded from the program without a pre-exclusion hearing before an ALJ to determine whether the provider or practitioner poses a serious risk to Medicare beneficiaries.[210]

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[202] *See* Perritt, *supra* note 201, at 1642–47; 1 C.F.R. § 305.85-5 (1987).

[203] *See* A. GOSFIELD, PSRO'S: THE LAW AND THE HEALTH CONSUMER 32–33 (1975).

[204] OBRA '87, Pub. L. No. 100-203, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 1330, 1330-136.

[205] *Id.* at 1330-137.

[206] THIRD SCOPE OF WORK, *supra* note 3, § XVIII(C), at 40–41.

B. *Criticisms of the PRO Sanction Process*

The PROs' exercise of their sanctioning authority has made them the target of much criticism. As of December 31, 1987, 38 of the 54 PROs had referred 151 cases to the OIG; the OIG had excluded 60 physicians and 1 facility and assessed a penalty against 24 physicians and 2 facilities.[211] This represents about 19 sanctions per 100,000 physicians serving Medicare beneficiaries. Through September 1987 twenty-three states and the District of Columbia, containing one-fifth of the nation's doctors and Medicare beneficiaries, had not successfully recommended a single sanction.[212] Though it is impossible, of course, to determine the optimal level of sanctioning, it is difficult to believe that 99.98% of doctors treating Medicare beneficiaries (and 100% in twenty-three states) are doing a satisfactory job, especially given common estimates that incompetency among doctors runs at levels of 5% to 10%.[213] Some consumer groups have been sharply critical of the timidity of the PROs in sanctioning doctors,[214] and the OIG has occasionally joined this criticism.[215]

Attorneys representing providers with whom I spoke, on the other hand, are sharply critical of what they see as oppressive aggressiveness on the part of the

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[207] 42 U.S.C. § 1320c-5(b) (1982).

[208] *Id.* § 1320c-5(b)(1). This provision further states that if HHS fails to take action within 120 days, the practitioner or provider will be excluded until HHS decides otherwise. This clause was put in the statute to address the problem of HHS delay in acting on sanctions recommended by the PSROs. The OIG has consistently taken action on PRO recommendations within 120 days, consigning this provision to desuetude.

[209] *Id.* § 1320c-5(b)(3).

[210] *Id.* § 1320c-5(b)(5). HHS has implemented these statutory provisions through regulations appearing at 42 C.F.R. pt. 1004 and PRO MANUAL, *supra* note 53, Transmittal No. 15 of May 1987.

[211] *See* OIG SANCTION REPORT, *supra* note 6, at 11.

[212] *Subcomm. on Health, Comm. on Ways and Means*, 100th Cong., 1st Sess. 2, 3 (1987) (testimony of Sidney Wolfe, Director Pub. Citizen Health Research Group) [hereinafter Testimony of S. Wolfe].

[213] *See* Derbyshire, *Medical Discipline in Disarray: The Incompetent Physician*, 18 HOSP. PRAC. 30, 31 (Nov. 1983).

[214] Testimony of S. Wolfe, *supra* note 212; Kotelchuck, *Watchdog on a Short Chain*, HEALTH/PAC BULL., Spring 1987, at 19, 21.

[215] *See* Webber, *A PRO Report Card*, THE INTERNIST, July 1986, at 7, 9.

PROs.[216] They properly note the devastating effect that exclusion from the Medicare program has on physicians. While an excluded physician may in theory continue to practice (and even to treat Medicare beneficiaries if he or she is willing to do so without compensation), Medicare nationally pays for 21% of physicians services[217] and provides a much higher proportion of the income for some specialists. Secondary effects of Medicare exclusion can, moreover, be even more devastating. Attorneys with whom I talked stated that after exclusion their clients ceased to receive referrals from other doctors, were terminated from hospital medical staffs, and were investigated by state licensure agencies. While they waited up to eighteen months for ALJ hearings and judicial review, excluded doctors were forced to maintain the high overhead of their practices and pay high legal fees without income, an ordeal that drove at least one into bankruptcy.

The proceedings that resulted in these consequences were passionately criticized by provider representatives. Though PRO procedures were substantially amended under a May 1987 compromise between the OIG, HCFA, the AMA, and the American Association of Retired Persons (AARP) to assure greater procedural protections for sanctioned providers and practitioners at the PRO level,[218] provider attorneys still complain of the inability to cross-examine the reviewers (often anonymous) who initiated the proceedings, the informality of the proceedings, and the lack of notice and standards. Their harshest criticism, however, is focused on the perceived bias of PRO sanction proceedings. Physician representatives widely believe that PROs are directly rewarded for sanctioning providers and threatened with contract termination for not doing so, and thus are heavily biased against providers once sanctions are recommended. They also believe that the OIG is prejudiced against providers and does not provide an effective review of PRO recommendations.[219]

The vast majority of those involved in the sanction process, including the PROs and many beneficiary and provider representatives, are somewhere between these poles and most show a marked ambivalence about PRO sanctions. On the one hand, 87% of respondents interviewed in a recent study felt that the PROs' sanction authority strengthened their ability to perform their mission.[220] Without the threat of sanctions, the PROs' educational and corrective efforts would be less likely to get the attention of the medical community. On the other hand, the PROs feel uncomfortable with the hostility the sanction process has generated and are frustrated by the time and resources that go into the sanction process. Two-thirds of PRO CEOs interviewed by the OIG felt that the sanction process continues to be problematic.[221] PROs are particularly frustrated with the inconsistent instructions they get from HCFA and the OIG as to when to sanction, the proportion of PRO sanction recommendations rejected by the OIG (over half in 1987),[222] and their rate of reversal in ALJ proceedings.

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[216] *See also* Schorr, *Peer Review: Still Tilting at Windmills*, 27 PHYS. MGMT. 124 (Oct. 1987); Remarks by Hanson, Cal. Med. Ass'n 1987 House of Delegates (Mar. 10, 1987).

[217] Div. of Nat'l Cost Estimates, Office of the Actuary, Health Care Fin. Admin., *National Health Expenditures, 1986–2000*, 8 HEALTH CARE FIN. REV., Summer 1987, at 1, 13.

[218] *See* U.S. Dep't of Health & Human Servs. News Release, *Changes in PRO Sanction Process*, May 13, 1987 (implemented by *Manual Transmittal 15*).

[219] *See* Carlova, *Have Peer Reviewers Put a Price on Your Head?*, MED. ECON., Sept. 5, 1988, at 62.

[220] OIG SANCTION REPORT, *supra* note 6, at 12.

[221] *Id.* at 15.

One thing is clear: the rate of sanctioning activity has dropped dramatically in the recent past, after climbing steadily since the inception of the PRO program. During 1985 seven cases were recommended to the OIG by the PROs for sanctions and all were accepted. During 1986, the high water year for sanction activity, seventy-seven were recommended, and fifty-five were accepted. During 1987 the level of recommendations dropped slightly to seventy, but the number of OIG acceptances dropped dramatically to twenty-five.[223] As of July, only ten cases had been referred to the OIG for sanctions in 1988. With individual PROs, the drop-off has been even more dramatic. In the first two years of the program, the California PRO was among the most active in recommending sanctions, but within the last year it has not referred any cases to the OIG for sanctions.

The reasons for this decline in activity are disputed. The most optimistic view is that the initial flurry of sanction activity has cleared up all problems, and further sanctions are not necessary. A more realistic view is that the PROs, having gotten the attention of physicians, can now rely more on less drastic interventions. Additional procedures imposed by the May 1987 compromise may have impeded the sanction activity of some PROs, but many of the PROs had already implemented these protections prior to the compromise. The most likely explanation for the slowdown is that a variety of administrative impediments are discouraging the PROs from sanctioning the physicians. First, the OIG has rejected a large proportion of sanction referrals, which has discouraged PROs from referring cases. Second, PROs have noted the high rate of ALJ reversals of sanction cases and have become reluctant to commit the heavy expenditure of resources necessary to get a case to the ALJ level if reversal seems inevitable.

In order to understand the decline in PRO sanction activity, it is important to consider the reasons why PRO sanction cases are being rejected. Of the fifty-six cases rejected by the OIG in 1987, twenty were rejected because the PRO had failed to establish the inability or unwillingness of the physician or provider to meet statutory obligations.[224] PROs have generally concluded that they will not be able to establish inability or unwillingness without documenting a pattern of violations over a period of time, and they are thus keeping physicians under correction plans for several weeks or months before referring for sanctions. Many PROs have also concluded that the OIG will not accept referrals when only a single instance of gross and flagrant conduct is involved (despite clear statutory language to the contrary) or of cases involving fines.[225] PROs have also experienced difficulty collecting payments from HHS for sanction activities, which are supposed to be separately reimbursed.[226]

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[222] *Id.* at 17.
[223] *Id.*
[224] *Id.* at 18.

In sum, despite significant changes in the sanction process over the last two years, the process still seems not to be working very smoothly.

C. *The PRO Quality Assurance and Sanction Process Described*

All PROs, as required by the *Scope of Work* and PRO contracts, have a two-stage process through which cases must go before sanctions are imposed. Sanction cases normally begin in the quality assurance process, which identifies and attempts to correct quality problems.[227] Serious or repeated problems identified through the quality assurance process are sent on to the sanction process. The *Third Scope of Work* establishes broad guidelines for the quality assurance process; the PRO regulations[228] set out more specific guidelines for the sanction process. Both processes vary considerably, however, from PRO to PRO.

In all PROs, the first step down the long road to a PRO sanction is taken (in most instances) when a nurse reviewer kicks out a case for failing one of the generic quality screens or another quality, utilization, or discharge screen.[229] In most PROs, the case is then reviewed by a physician reviewer, who will in all likelihood not belong to the specialty of the doctor under review. If the review is conducted on-site at a hospital, the doctor is even less likely to be specialty-matched.[230]

If the initial physician advisor determines that there is a quality problem, one of several things may happen. In four of the twelve PROs I interviewed, the PRO sends a letter to the attending physician or provider and asks for an explanation of the problem. In six of these PROs, the case is referred to one or more specialists matched with the specialty of the physician under question, who further reviews the case. If the specialist agrees that there is a problem, the attending physician or provider is contacted for further information; otherwise the matter is dropped. Finally, in the two other PROs with which I spoke, the case is sent to a medical director or quality review committee simultaneously with or before a request to the attending physician or provider for more information. In several of the PROs, minor problems are noted at this level for future consideration if patterns develop, but they are not immediately acted on.

Once a response is received from the attending physician or provider, the response is reviewed, in most of the PROs, by a matched specialist, usually someone other than the initial reviewer. In one-fourth of the PROs I interviewed, however, the record and the physician's or provider's response go directly to a quality assurance committee. In half of the PROs I interviewed, the matched specialist reviewer refers problem cases on to a quality assurance committee, often at a regional level. In two of the remaining PROs, the matched specialist sends out a second letter noting that the problem has not been cleared up and requesting more information. This letter may be sent to hospitals at which the attending physician has staff privileges as well as to the doctor. Again, during this further review, cases may be classified using a grid, with serious cases being pursued aggressively and less serious cases being noted for future profile review.

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[225] *Id.* at 16. These issues are the subject of a recent GAO investigation. *See generally* GAO MEDICARE PROS, *supra* note 175.

[226] OIG SANCTION REPORT, *supra* note 6, at 16. Payment for sanction activity after an initial sanction letter is sent is supposed to be in addition to the amount included in the PRO contract for quality assurance generally. *See* 2 Medicare & Medicaid Guide (CCH) ¶ 12,875 (1986).

[227] Potential sanction cases can also be identified in the utilization review process, but they seldom are.

[228] 42 C.F.R. pt. 1004 (1987).

[229] Cases could also be identified by beneficiary complaints or by referrals from fiscal intermediaries, HCFA regional offices, or state medical boards.

[230] In the median PRO surveyed by the GAO recently, only 30% of the cases were specialty-matched for the doctor's review. GAO MEDICARE PROS, *supra* note 175, at 21.

In three-fourths of the PROs I interviewed, serious or repeated problems eventually end up in a quality assurance committee. In about one-third of the PROs, this committee meets with the physician. These committees vary in size from three to twelve members, often meet at a regional level, and are usually composed of an assortment of specialists. In two of the PROs I interviewed, there are two layers of committee review before a case can be referred for sanctions. The quality assurance committee normally imposes a corrective action plan on the doctor and then monitors compliance over a period of time.[231] Some PROs monitor corrective action plans for a set period of time (thirty, sixty, or ninety days). Other PROs (recognizing that a doctor can simply avoid problem cases until a time-limited corrective action plan expires) monitor corrective action plans for a set number of specific kinds of cases.[232]

If a problem persists through all of these layers of review, it enters the sanction process, which is often handled by a different committee. As is clear by now, the number of steps in the review process between the initial identification of a problem and a final decision to pursue sanctions varies considerably from PRO to PRO (though many of the PROs can expedite their normal processes in egregious cases). An AMA study found that the number of physician reviewers who review a case before a sanction letter is sent varied from three to thirty-five, with a mean of ten and a median of seven.[233] My impression is that the PROs with the most expedited procedures have traditionally been the most active in sanctioning physicians.[234]

The *Third Scope of Work* imposes a quality review process that may streamline this process in some PROs and complicate it in others. Under this process, the PRO has sixty days from the date of receipt of fiscal intermediary sampling data to obtain records, run them through criteria screens, and have problems assessed by a physician advisor.[235] Identified problems must then be reviewed within thirty days by a specialist or quality assurance committee.[236] When problems are not resolved, the provider must be given an opportunity to discuss the case, which consumes another thirty days.[237] Finally, the PRO has 15 additional days to confirm or not confirm the quality problem and to send final notice to the attending physician or provider, for a total of 135 days.[238] Within this 135-day maximum, PROs may adjust the time frame, as long as the attending physician or provider is given 30 days to discuss the problem.[239]

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[231] *See* OIG SANCTION REPORT, *supra* note 6, at 8 (describing this process further). The OIG QUALITY REPORT, *supra* note 167, at 18, noted that corrective action was relatively uncommon, but my impression in speaking with the PROs was that it was increasingly common. The AMA PRO EXECUTIVE SURVEY, *supra* note 136, Table 14, found that the PROs the AMA interviewed had imposed from 0 to 98 corrective action plans, with a mean of 15.6. A recent GAO study includes more information on corrective action plans. *See generally* GAO MEDICARE PROs, *supra* note 175.

[232] For example, if a corrective action plan applies for 50 cases, the doctor will be monitored for 50 cases, whether it takes him 1 month or 24 to handle this volume.

[233] AMA PRO EXECUTIVE SURVEY, *supra* note 136, Table 11.

[234] The OIG SANCTION REPORT, *supra* note 6, at 14, agrees with this assessment. The OIG QUALITY REPORT, *supra* note 167, at 18, notes that, conversely, the PROs with the most complicated procedures sanction the least.

[235] THIRD SCOPE OF WORK, *supra* note 3, § V(B), at 6.

The initial reviewer in the *Third Scope of Work* quality assurance process must classify problems into one of three categories depending on the severity of the problem. The most trivial, severity level I, problems are noted but not acted upon unless a pattern emerges.[240] Severity level II and III problems are to be profiled on a quarterly basis.[241] Appropriate interventions are to be pursued by the PRO, depending on the weighted score assigned to confirmed problems.[242] These might include notification, education, intensified review, coordination with licensing and accreditation bodies, and, ultimately, sanctions.[243] Though cases appropriate for sanctions will normally be identified through the quality assurance process, the sanction process is independent, and sanctions may be initiated in appropriate cases even though not required by the quality assurance process.[244]

Once a problem is finally confirmed and a case enters the sanction process, it is governed by 42 C.F.R. part 1004.[245] If the case involves a substantial number of substantial violations, the PRO begins by sending a sanction notice to the provider or physician and requesting additional information or a meeting to discuss the problem within twenty days of the receipt of the notice.[246] For a gross and flagrant violation, or the case of a substantial number of substantial violations not cleared up through the discussions following this initial notice, a second notice is sent out requesting additional information or an opportunity to meet within thirty days.[247] Both notices must clearly explain the problem identified, the obligation violated, the facts relied on, the potential consequences of a sanction, and the importance of the sanction meeting.[248] At the thirty-day notice meeting, the physician or provider may have an attorney present who may make opening and closing remarks, ask clarifying questions, and assist in presenting expert witnesses.[249] Physicians who are biased against or in direct competition with the accused physician or provider, or who were responsible for the findings presented to the sanction committee, may not vote on the sanction recommendation.[250]

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[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.* § V(D), at 7.

[241] *Id.* § V(F), at 8.

[242] *Id.* §§ V(F)–(G), at 8–13.

[243] *Id.* § V(G), at 10–12. The most common intervention is a notification letter, used 6 times per 1000 physicians per quarter in 1987–88. PROs consider sanctions to be the most effective intervention for dealing with quality problems. GAO MEDICARE PROs, *supra* note 175, at 25–27.

[244] THIRD SCOPE OF WORK, *supra* note 3, § V(G)(4), at 13.

[245] A description of this process is included in the OIG SANCTION REPORT, *supra* note 6.

[246] 42 C.F.R. § 1004.40 (1987).

[247] *Id.*

[248] *Id.* §§ 1004.40, .50; U.S. Dep't of Health & Human Servs. News Release, *Changes in PRO Sanction Process*, May 13, 1987.

[249] PRO MANUAL, *supra* note 53, § 6025(B).

If the PRO decides to recommend that the OIG sanction a physician or provider, it sends its determination to the OIG. The physician or provider may send additional information within thirty days to the OIG.[251] The PRO report to the OIG must thoroughly explain the basis for the recommended sanction. It must also recommend an appropriate period of exclusion or amount of monetary fine,[252] considering the type and severity of the offense involved, the deterrent value of a sanction, the previous record of the sanctioned individual or entity, the availability of alternative services in the community, and other relevant factors.[253] The OIG must then decide, considering these factors, whether or not to impose a sanction and also whether the provider is unwilling or unable substantially to comply with these obligations.[254] The sanction is effective fifteen days from the date the physician or provider receives the notice from the OIG.[255] The OIG also provides notification of the sanction to the public (through a notice in a local newspaper), state Medicaid fraud control units and state licensing bodies, hospitals and other facilities at which the physician has privileges, medical societies, and medical carriers, intermediaries, and HMOs.[256] The sanctioned provider or physician may appeal to an ALJ and ultimately obtain judicial review,[257] but this may be done only after the sanction has been implemented.[258]

D. *Major Issues in the PRO Sanction Process*

1. *Does the Constitution Require a Pre-exclusion Hearing?*

To this point, this Article has described the procedures afforded providers and physicians in the sanction process by the PRO statute, regulations, and *PRO Manual*. In a number of cases, sanctioned physicians have argued that these procedures are insufficient to meet the demands of the due process clause of the fifth amendment. In particular, they have argued that the Constitution guarantees them the right to an ALJ hearing before they are terminated from the Medicare program.[259]

An analysis of the rights that should be afforded physicians and providers must begin with a consideration of whether their participation in the Medicare program is protected by the fifth amendment. As interpreted by the Supreme Court, the fifth and fourteenth amendments do not protect all expectations; they protect only life, liberty, and property interests.[260] While it certainly may be argued that a Medicare beneficiary has a property interest in continued receipt of Medicare benefits, it is harder to argue that a provider or physician has a property right in a continued contractual relationship with the government to provide services to Medicare beneficiaries. Some courts have noted, therefore, that providers, who are not the intended beneficiaries of the program, have no rights beyond those provided in their contracts.[261] Other courts have recognized, on the other hand, the dependence of providers and physicians on Medicare and their expectation that they will not be terminated from Medicare without cause. On this basis, they have found a property right in continued program participation.[262] Still other courts have held that the reputational damage and injury to practice caused to a provider terminated from the Medicare program implicates a liberty interest.[263] Most of the cases considering PRO sanctions have been willing to assume the existence of a property or liberty interest and move on to the next question: What process is due?[264]

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[250] *Id.* § 6025(C)(2).

[251] 42 C.F.R. § 1004.60 (1987).

[252] *Id.* § 1004.70.

[253] *Id.* §§ 1004.70, .80.

[254] *Id.* § 1004.90.

[255] *Id.* § 1004.100.

[256] *Id.*

[257] *Id.* § 1004.130.

[258] Except for rural physicians; *see supra* text accompanying notes 181–84.

[259] Doyle v. Bowen, 848 F.2d 296 (1st Cir. 1988); Cassim v. Bowen, 824 F.2d 791 (9th Cir. 1987); Varandani v. Bowen, 824 F.2d 307 (4th Cir. 1987); Lavapies v. Bowen, 687 F. Supp. 1193 (S.D. Ohio 1988); Ferrer v. Bowen, No. C86-3523 (N.D. Ohio filed July 6, 1987); Papendick v. Bowen, 658 F. Supp. 1425 (W.D. Wis. 1987).

The question of whether sanctioned doctors are entitled to a pre-exclusion hearing must be answered under the *Mathews v. Eldridge* calculus by balancing the doctor's interest in greater procedural protection, the government's interest in expedited procedures, and the risk that the lack of a pretermination hearing will produce an erroneous deprivation.[265] Applying this calculus, the courts have uniformly rejected physicians' claims for a pre-exclusion hearing.[266] First, the courts have tended to minimize the interest of the sanctioned physician, noting that the doctor will continue to be able to serve his non-Medicare patients, that he may even continue to care for Medicare patients without compensation and claim compensation later when vindicated, and that a successful conclusion of a post-termination hearing will restore his reputation.[267] Second, they have stressed the compelling importance of expedited proceedings for protecting Medicare beneficiaries from seriously deficient physicians.[268] Finally, the courts have noted that the multiple levels of review afforded physicians before the OIG issues a sanction lower the risk of error to an acceptable level.[269] Summing these considerations, the courts have uniformly held that even the procedures provided to physicians before the May 1987 compromise afforded sufficient notice and an opportunity to respond to charges to accord with the requirements of due process.[270]

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[260] Board of Regents v. Roth, 408 U.S. 564, 569, 576 (1972).

[261] *See* Koerpel v. Heckler, 797 F.2d 858, 863–64 (10th Cir. 1986) (exclusion of doctor from Medicare reimbursement for 10 years); Geriatrics, Inc. v. Harris, 640 F.2d 262, 264–65 (10th Cir.), *cert. denied*, 454 U.S. 832 (1981) (termination of Medicaid funding for nursing home); Green v. Cashman, 605 F.2d 945 (6th Cir. 1979) (termination of Medicaid payments for nursing home).

[262] *See* Ritter v. Cohen, 797 F.2d 119 (3rd Cir. 1986) (termination of physician's participation in Medicaid program); Hathaway v. Mathews, 546 F.2d 227, 230 (7th Cir. 1976) (termination of Medicaid payments to nursing home); Case v. Weinberger, 523 F.2d 602, 606 (2d Cir. 1975) (removal of Medicare patients from nursing home); *Lavapies*, 687 F. Supp. 1193 (physician sanctioned by PRO); *Papendick*, 658 F. Supp. at 1432 (physician sanctioned by PRO).

[263] *Koerpel*, 797 F.2d at 865–66; *Lavapies*, 687 F. Supp. at 1201; Ferrer v. Bowen, No. C86-3523, slip op. at 8 (N.D. Ohio filed July 6, 1987). It is ironic that under the reasoning of *Koerpel* a physician or provider terminated for no reason at all would not have a right to due process, since he has no property right in participation in the Medicare program. A physician terminated, however, for gross and flagrant violations of professional standards of care is entitled to full due process protection, because his reputation has been impugned.

[264] Doyle v. Bowen, 848 F.2d 296, 302 (1st Cir. 1988); Cassim v. Bowen, 824 F.2d 791, 796–97 (9th Cir. 1987); Varandani v. Bowen, 824 F.2d 307, 310 (4th Cir. 1987).

[265] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[266] Thorbus v. Bowen, 848 F.2d 901 (8th Cir. 1988); *Doyle*, 848 F.2d at 302; *Cassim*, 824 F.2d at 797–98; *Varandani*, 824 F.2d at 310–11; *Koerpel*, 797 F.2d at 868–69; *Ritter*, 797 F.2d at 123–24; *Lavapies*, 687 F. Supp. at 1203; *Papendick*, 658 F. Supp. at 1431; County of San Diego v. Bowen, 631 F. Supp. 947, 953 (S.D. Cal. 1986); Kwoun v. Schweiker, 528 F. Supp. 1004, 1007 (E.D. Mo. 1981).

[267] *Cassim*, 824 F.2d at 797; *Ritter*, 797 F.2d at 123; *Ferrer*, slip op. at 10; *Papendick*, 658 F. Supp. at 1431.

One can certainly argue with the weight given to the relevant considerations in these cases. In particular, they tend to trivialize the devastating impact of exclusion on physicians. Nevertheless, the unanimity of their results clearly establishes the constitutionality of exclusions based on PRO recommendations prior to an adversarial hearing before an ALJ. This does not mean, of course, that a pre-exclusion hearing might not make sense. This issue will be considered later. First, however, the procedures that should be followed in the PRO and ALJ process will be further considered.

2. *Notice*

Though the Constitution does not require a pre-exclusion hearing, it does require that a provider or physician receive notice of the grounds on which the sanction is based.[271] The PRO regulations and manual set out fairly extensive and specific requirements for notices to be sent to the provider before the thirty-day review in a gross and flagrant case, before the twenty-day and thirty-day reviews in the case of a substantial number of substantial violations, and, finally, before OIG review in both situations.[272] The doctor is to be informed of the obligation violated, the basis for the PRO determination, the sanction the PRO will recommend, and the procedural rights the doctor is entitled to in the review process.

Despite these specific requirements, providers have encountered problems with notice in the PRO sanctions process. First, there are difficulties that seem to stem from the unfamiliarity of the doctors running the PROs with legal process. In one PRO sanction decision, for example, the ALJ faulted the PRO for providing the sanctioned doctor only with vague "issues of concern" rather than the clear and specific charges required by the regulations.[273] In other cases, PROs have raised new issues not covered by the original notice at a sanction meeting.[274] The May 1987 compromise requires PROs to use model letters that will more clearly give notice to providers threatened with sanctions. *Manual Transmittal 15* includes such forms and will, it is hoped, alleviate this notice problem.

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[268] *Doyle*, 848 F.2d at 302; *Cassim*, 824 F.2d at 799; *Papendick*, 658 F. Supp. at 1431–32.

[269] *Cassim*, 824 F.2d at 797–98; *Papendick*, 658 F. Supp. at 1431.

[270] *Doyle*, 848 F.2d at 302; *Varandani*, 824 F.2d at 313; *Koerpel*, 797 F.2d at 867–68 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)).

[271] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985).

[272] 42 C.F.R. §§ 1004.40–.70; PRO MANUAL, *supra* note 53, § 6025.

[273] *In re* Apakupakul, No. HIX-000-34-7009, at 32–33 (June 1, 1987).

[274] Approximately 40% of the sanction recommendations rejected by the OIG in 1987 involved instances of the PROs failing to follow regulatory procedures, including presumably failing to give proper notices. OIG SANCTION REPORT, *supra* note 6, at 18.

The second notice issue is more narrow in focus. As stated earlier, the statute permits a provider or physician to be sanctioned only if it "has demonstrated an unwillingness or a lack of ability substantially to comply" with program obligations.[275] The regulations place the obligation to determine this fact on the OIG, after it considers the recommendation of the PRO.[276] At no point, however, do the regulations require that the provider or physician be given notice as to the basis for this determination or an opportunity to respond to it. In *Lavapies v. Bowen*,[277] the OIG was enjoined from imposing an exclusion until the question of willingness and ability was raised and discussed. If this requirement continues to be part of the law, the regulations should be amended to assure that the PRO gives the provider or practitioner notice of the basis of its unable or unwilling recommendation and an opportunity to respond.

3. *Confidentiality and Disclosure Issues*

The PRO confidentiality and disclosure statute and regulations have several provisions pertinent to the hearing process. First, 42 U.S.C. section 1320c-9 imposes strict limitations on the disclosure of patient information. These limitations have been relied on to impede the access of expert witnesses called by sanctioned physicians and providers to information necessary for analyzing the patient care at issue in the sanction proceeding. *Manual Transmittal 15*, section 6025(C)(1), clarifies that such information should promptly be made available to expert witnesses and may solve this problem.

A larger issue is raised by 42 C.F.R. section 476.139(a), which prohibits disclosure of PRO deliberations except to the OIG and HCFA. While this regulation, by itself, might seem to leave providers and practitioners in the dark as to why a PRO has sanctioned them, section 476.139(b) requires PROs involved in administrative hearings to give reasons for their decisions, including the detailed facts, findings, and conclusions that support their determinations. These rules are consistent with general administrative law requiring that decisionmakers issue findings of fact and conclusions of law, but prohibiting inquiry into the deliberative process to assure frank and free discussion.[278] They should not cause providers undue hardship.

Even more significant to providers or physicians in the PRO sanction proceedings is the question of whether they can discover the identity of the reviewers who initiated or participated in the review process. Section 476.101(b) protects the identity of PRO reviewers as confidential. This provision is supported by the PROs, which believe that their always lean supply of qualified physician reviewers might dry up if reviewers became subject to the threat of litigation and to other forms of retaliation that might occur were their identity to become known. These fears are not irrational, as 42 U.S.C. section 1320c-6 only offers physician reviewers qualified legal immunity for their review activities.[279] Moreover, specialist reviewers may legitimately fear that they will lose referrals if it becomes known that they are responsible for sanctioning other physicians.

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[275] 42 U.S.C. § 1320c-5(b) (1982).

[276] 42 C.F.R. §§ 1004.90(d)(7), .70(c)(4) (1987). PRO MANUAL, *supra* note 53, § 6025, states that the physician or provider may address the issue of ability and willingness at the PRO sanction meeting, but does not require the PRO to notify the provider or practitioner of the evidence on which this determination will be made.

[277] 687 F. Supp. 1193, 1201–02 (S.D. Ohio 1988).

[278] United States v. Morgan, 313 U.S. 409, 422 (1941).

Sanctioned physicians and their representatives, on the other hand, complain that this provision deprives them of the opportunity to confront their accusers, a basic right in Anglo-American jurisprudence. Many of them believe that once a reviewing physician decides that an attending physician's practice has been deficient, subsequent reviewers tend to accept the initial reviewer's analysis uncritically. They are concerned that if the initial reviewer cannot be questioned, it will be difficult to convince the sanction committee that the initial reviewer's reasoning was flawed. Moreover, the regulation conceals from sanctioned physicians not only the initial reviewer's identity, but also his credentials. Denied access to these credentials, providers or physicians cannot determine whether the initial reviewer was competent to review the particular case.

These interests can largely be accommodated. Providers and physicians in the sanction process should be apprised of the identity and credentials of reviewers who present evidence against them before sanction review committees and before ALJs. The identity of the much more numerous physician advisors and specialist reviewers who identify cases involving inappropriate care for referral to the sanction process should not be revealed, however, as long as their opinions are not relied on exclusively by those making the final PRO sanction decision. The credentials of these reviewers—for example, whether or not they are board-certified and in what specialty, the nature of their practice, or how long they have been in practice—should be revealed to the sanctioned physician or provider, if this can be done without revealing the reviewer's identity.

A final disclosure issue involves the method by which beneficiaries are made aware of PRO exclusions. Currently, the OIG is required to publish in a newspaper of general circulation a notice identifying sanctioned providers.[280] The May 1987 agreement committed HCFA and the OIG to promulgate a regulation allowing physicians to have the option of notifying their own Medicare patients of their exclusion. This option has not yet been implemented. While allowing physicians to notify their own patients directly may be more protective of their dignity, and may even make it more certain that beneficiaries will be notified of the sanction, it is difficult to understand how this provision will be enforced. The temptation would surely be great for a sanctioned physician to provide his or her patients with something less than the full truth about the exclusion or even not to send the notice at all. It is important in implementing this provision for HHS to assure that Medicare beneficiaries do in fact receive a prompt and accurate notice of exclusion.[281]

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[279] They must exercise "due care" to receive immunity (*but see* Kwoun v. Southeast Mo. PSRO, 811 F 2d 401 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1994 (1988) (finding PSRO employees absolutely immune from suit)).

[280] 42 C.F.R. § 1004.100(d) (1987).

4. *Burden of Proof and Weight of Evidence Issues*

The PRO statute, regulations, and *Manual* do not clearly identify who bears the burden of proof in establishing the appropriateness of a sanction at the PRO or ALJ level. The APA provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."[282] This would seem to put the burden on the PRO or the OIG seeking a sanction to prove up its case before an ALJ. On the other hand, the sanction statute places the obligation on providers and physicians to assure that services provided Medicare beneficiaries are "supported by evidence of medical necessity and quality in such form and fashion and at such time as may reasonably be required" by a reviewing PRO.[283] This would seem to support the position of the OIG that the provider or physician when challenged has the burden of establishing that services meet the Act's requirements.[284]

Several ALJ opinions have considered the burden of proof issue at the ALJ level. They note that the proceeding is de novo and that there is, therefore, no presumption that there has been a violation for which the sanction proposed by the ALJ is appropriate.[285] As the OIG initiates the sanction proceedings, these decisions place upon it the burden of offering evidence to establish the statutory requirements for exclusion from the program.[286] Once the OIG has presented this evidence, however, the ALJ opinions split. Two ALJ opinions place on the respondent the ultimate burden of proof that the sanction was factually unsupported and legally unjustified.[287] A third seems to say that the burden remains on the OIG to prove its case.[288] A fourth opines that the burden is "shared."[289]

Because physician and provider participation in Medicare has become so widespread and so essential to the practice of medicine, it is appropriate that the proponent of the sanction of exclusion at both the PRO and ALJ level bear the burden of establishing that the exclusion requirements of 42 U.S.C. section 1320c-5 have been met. This is consistent with practice in OIG civil penalty cases[290] and with administrative law generally when a party is charged with an illegal or improper act.[291]

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[281] ABA Commission on Legal Problems for the Elderly & The Administrative Conference of the United States, Medicare Procedures Symposium: Report and Recommendations 30 (1987) [hereinafter ABA/ACUS Recommendations] (suggests individualized mailings as a more effective means of notifying beneficiaries than newspaper notice).

[282] 5 U.S.C. § 556(d) (1982).

[283] 42 U.S.C. § 1320c-5(a)(3) (1982).

[284] *See* Fairfax Hosp. Ass'n Inc. v. Califano, 585 F.2d 602, 611 (4th Cir. 1978) (Medicare provider has burden of establishing validity of disallowed claim in administrative proceedings).

[285] *In re* Lifshutz, No. 000-44-7020, at 8–10 (Mar. 25, 1988); *In re* Polka, No. HIP-000-00-0229, at 6 (June 17, 1987).

[286] *Lifshutz*, No. 000-44-7020, at 10.

[287] *Polka*, No. HIP-000-00-0229, at 6; *In re* Apakupakul, No. HIX-000-34-7009, at 7 (June 1, 1987).

[288] *Lifshutz*, No. 000-44-7020, at 10.

[289] *In re* Santos, No. 000-54-7029, at 3 (Feb. 25, 1988).

[290] *See* 42 C.F.R. § 1003.114 (1987).

The question of the standard of proof is less controversial. Although some provider attorneys have argued that the serious consequences of sanctions call for a clear and convincing evidence standard,[292] ALJs have uniformly required only proof by a preponderance of the evidence.[293] This is consistent with the general standard of proof in administrative law[294] and is appropriate in these cases, given the balance of weighty considerations favoring both the protection of providers and of beneficiaries.

5. *The "Unwilling or Unable" Requirement*

As noted earlier, 42 U.S.C. section 1320c-5 prohibits HHS from sanctioning providers or practitioners unless they have "demonstrated an unwillingness or a lack of ability substantially to comply" with program obligations. The failure of the OIG to establish this element to the satisfaction of an ALJ has been the cause of several OIG losses in sanction cases.[295] Failure of PROs to establish unwillingness or inability has also been one of the most frequent reasons for rejection of PRO sanction recommendations by the OIG.[296] The OIG has noted the confusion involving the determination of unwillingness and inability and has recommended that Congress delete the requirement.[297] This would make the PRO legislation consistent with section 1128(b) of the Social Security Act, which allows the OIG to exclude poor quality providers without showing unwillingness or inability.[298] It would also restore the law existing under the PSRO program, which permitted proof of the underlying violations of standards to establish unwillingness or inability to comply.[299]

It is difficult to prove that providers or physicians are unwilling or unable to comply with program obligations. Most doctors faced with sanctions will enthusiastically express their willingness to comply, and many ALJs believe that if a doctor is licensed he should be able to comply. In one case, for example, the ALJ concluded that in several instances the services provided by the sanctioned doctor had grossly and flagrantly violated professional standards. Noting, however, that the doctor said he was now willing to comply, and seemed to be bright and well-educated, the ALJ threw out the sanction recommendation.[300] In another case, the ALJ found that the PRO must attempt a corrective action plan before it can establish unwillingness or inability.[301] On the other hand, ALJs have excluded doctors when they felt that the doctor lacked a basic understanding of medical symptoms and procedures.[302]

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[291] 73A C.J.S. *Public Administrative Law and Procedure* § 128 (1983).

[292] *See* Adams & Krebs-Markrick, *Defending Physicians Before the Peer Review Organization: Practical Strategies and Tactics in Sanction Proceedings*, in National Health Lawyers Association, Utilization, Management, PROs and Quality Assurance: The Legal Pitfalls 21 (1987).

[293] *In re* Lifshutz, No. 000-44-7020, at 10 (Mar. 25, 1988); *In re* Polka, No. HIP-000-00-0229, at 6 (June 17, 1987); *In re* Apakupakul, No. HIX-000-34-7009, at 23 (June 1, 1987).

[294] *See* Steadman v. SEC, 450 U.S. 91 (1981); Breeden v. Weinberger, 493 F.2d 1002, 1005 (4th Cir. 1974); Whaley v. Gardner, 374 F.2d 9, 10 (8th Cir. 1967).

[295] *Lifshutz*, No. 000-44-7020, at 18–20; *In re* Hill, No. HIX-000-64-7015, at 5–6 (Nov. 16, 1987); *In re* Rodabaugh, No. PS 000-74-7002, at 4–5 (June 9, 1987).

[296] OIG Sanction Report, *supra* note 6, at 18.

[297] *Id.* at 16, 21.

[298] 42 U.S.C.A. § 1320a-7(b)(6)(B) (West 1983 & Supp. 1988). Section 1128 allows the OIG to exclude providers or physicians from Medicare who have been convicted of various crimes, lost their licenses or been excluded from other governmental programs, committed fraud, or refused to cooperate with various program requirements. It also permits exclusion of individuals or entities who provide items or services "substantially in excess of the needs of . . . patients, or of a quality which fails to meet professionally recognized standards." This provision is used relatively infrequently, principally to sanction physicians for errors committed in practice settings not supervised by the PROs, such as in their private offices.

[299] Social Security Amendments of 1972, Pub. L. No. 92-603, § 1160(b)(1), 86 Stat. 1548, 1683 (codified at 42 U.S.C. § 1320c-5(b)(1)), amended by Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 388.

At the PRO level, the requirement has generally resulted in PROs imposing lengthy corrective action plans before considering a sanction. Most of the PROs with which I spoke believe that in most cases unwillingness and inability can only be demonstrated by the failure of a corrective action plan. There is much to be said for this approach, as correction through education is the primary focus of the PRO program. It is unfortunate, however, if this approach results in incompetent physicians being kept in practice until they injure a sufficiently large quota of patients.

On balance, the "unwilling or unable" requirement should be repealed. If it is retained, however, HCFA should issue regulations making it clear that unwillingness and inability can be proved by establishing uncooperativeness, lack of basic knowledge or skills, impairment, or extreme incompetence over a period of time in the past, as well as through showing failure to comply with a corrective action plan.

It is especially important that monetary penalties be imposed for deterrence purposes on physicians and providers guilty of gross or repeated violations regardless of their willingness or ability to be good in the future. One plausible interpretation of 42 U.S.C. section 1320c-5 is that the "unwilling or unable" to comply requirement of subsection (b)(1) does not apply to the monetary penalty provision, subsection (b)(3), and one ALJ has read the statute to say this.[303] Under this reading of the Act, further legislation is not necessary to reach this result.

6. *Money Penalties*

Section 1320c-5(b)(3) allows HHS, in lieu of exclusion, to require a practitioner or provider who has provided improper or unnecessary services to pay a monetary penalty of an amount not in excess of the actual or estimated cost of those services. This provision provides in theory a useful, less drastic, alternative to exclusion. Alternative sanctions to program exclusion that can be applied flexibly to address particular problems have proven very useful in other regulatory schemes, such as nursing home licensure,[304] and should be available to the PROs.

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[300] *In re* Hill, No. HIX-000-64-7015, at 5–6 (Nov. 16, 1987); *see also In re* Rodabaugh, No. PS 000-74-7002, at 4 (June 9, 1987) (willingness of doctor to engage in continuing education and to monitor patients enough to show willingness and ability).

[301] *In re* Lifshutz, No. 000-44-7020, at 19 (Mar. 25, 1988).

[302] *See In re* Betty, No. HIX-000-64-7003, at 2 (Sept. 30, 1987); *In re* Rivero, No. HIS-000-64-7010, at 24–25 (Sept. 29, 1987).

[303] *In re* Santos, No. 000-54-7029, at 22 (Feb. 25, 1988).

[304] *See* INSTITUTE OF MEDICINE, IMPROVING THE QUALITY OF CARE IN NURSING HOMES 162–68 (1986). *See also* 1 C.F.R. § 305.79-3 (1987) (ACUS recommendations regarding civil penalties).

Unfortunately, the ALJs enforcing the penalty provision have read it very narrowly to limit monetary penalties to the amount of isolated charges strictly applicable to a particular medical procedure determined to be unnecessary or of poor quality.[305] The result in one case was a penalty of $65.44.[306] Obviously penalties of this size do not justify the cost of a sanction process, and the OIG has effectively ceased using the monetary penalty authority or accepting PRO recommendations for penalties.[307]

The PRO legislation ought to be amended to allow the OIG to impose monetary penalties of up to $10,000.[308] This would allow the OIG to impose a sanction that providers and physicians would take seriously but would be short of exclusion from the program. As stated above, this sanction should be for past violations of physician and provider obligations and be aimed at deterring future violations. It should not, therefore, be subject to the "unwilling or unable" to comply requirement.

7. *Bias*

One of the most fundamental rights afforded by due process to a person subject to an administrative adjudication is the right to a hearing before an impartial tribunal.[309] One of the most persistent complaints made against the PROs by physicians and providers is that their hearing procedures are inherently biased against providers and practitioners accused of sanctionable conduct. This charge takes three forms.

First, review by one's peers can also mean review by one's competitors. There has been a general concern that reviewers who participate in the quality assurance and sanction process may be competitors of the sanctioned physician, eager to get him or her out of the way to expand their own practice. Conversely, there is the concern that PRO reviewers may be friends and associates of those whose care they review, biased against the public whom they should be protecting. These concerns are addressed to a minimal extent by the PRO regulations, which prohibit persons from reviewing cases if they have participated in treating the beneficiary, are a member of the beneficiary's family, or have a management or ownership interest in the facility at which services were furnished to the beneficiary.[310] The *PRO Manual* further requires PROs to assure that members of any hearing panel making a final sanction decision are not affected by personal bias or direct economic competition with the accused provider or practitioner.

In practice, most PROs go beyond these requirements to avoid this sort of bias. All of the PROs with which I spoke refuse to allow physicians to review cases from hospitals or HMOs at which they have staff privileges to guard against both prejudice and favoritism. One even had a computer system to assure that this would not happen. Several went further, refusing to allow reviewers to review cases from their own community or from communities from which they received referrals. This policy was particularly prevalent in rural areas. Other PROs do not allow doctors on statewide sanction committees to vote on cases from their region and allow the provider or practitioner subject to sanction proceedings to object to committee members who are suspected of bias. These protections seem adequate to the job and have been accepted by the one case that has directly addressed this bias question.[311]

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[305] *See Santos*, No. 000-54-7029, at 19–20; *In re* Polka, No. HIP-000-00-0229, at 20 (June 17, 1987).

[306] OIG QUALITY REPORT, *supra* note 167, at 9.

[307] *See* OFFICE OF INSPECTOR GENERAL, PRO TECHNICAL INFORMATION MEMORANDUM No. 2, at 3 (July 24, 1987) (fines only cost effective when an improper pattern of care involving substantial reimbursement is involved).

[308] *See* ABA/ACUS RECOMMENDATIONS, *supra* note 281, at 30; OIG SANCTION REPORT, *supra* note 6, at iii.

[309] Withrow v. Larkin, 421 U.S. 35, 46 (1975).

[310] 42 C.F.R. § 466.98(d) (1987).

A second concern is that the PROs inappropriately combine the prosecutorial and adjudicatory function—that is, reviewers who recommend sanctions are permitted to participate in the decisionmaking process. It is generally inappropriate for an administrative officer to participate in both the prosecution and decision of a case,[312] though the Supreme Court has rejected calls for strict separation of investigative and adjudicatory functions.[313] The one PRO case in which the issue was raised rejected a strict separation requirement.[314] On the other hand, ALJs have rejected the testimony of PRO experts who participated in a sanction investigation as not credible.[315]

Manual Transmittal 15, growing out of the May 1987 compromise, provides that a physician who "was solely or primarily responsible for making medical judgments and developing the record and initial findings to be used at the discussion shall not vote on the PRO's final determination about whether or not to recommend a sanction to the OIG."[316] This provision does not apply, however, to physicians who summarize the views of others to assemble a record and findings for the sanction meeting. It provides a useful compromise between the need to protect the rights of a physician or provider threatened with a sanction and the need of the sanction committee to have available someone with knowledge of the case. My impression from interviews with the PROs is that this provision has not yet been implemented by all of the PROs. It should be.

Finally, the most serious charge of impropriety against the PROs is that they are inherently biased against providers because renewal of their contracts depends on their meeting a "quota" of sanctioned providers.[317] The PROs operate pursuant to contracts with HHS, and their multimillion dollar contracts depend on meeting contract objectives. Provider attorneys have frequently claimed that favorable evaluations of the PROs by HHS, and thus renewal of their contracts, depend heavily on the number of sanctions imposed by the PROs. They also claim that OIG officials are rewarded for wringing sanctions out of the PROs.[318] Thus the PROs and OIG must find victims to sanction, whether or not those victims actually are guilty of sanctionable offenses.[319]

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[311] Lavapies v. Bowen, 687 F. Supp. 1193, 1203–04 (S.D. Ohio 1988).

[312] American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966).

[313] *Withrow*, 421 U.S. 35.

[314] Doyle v. Bowen, 660 F. Supp. 1484, 1488 (D. Me. 1987), *rev'd on other grounds*, 848 F.2d 296, 302 (1st Cir. 1988).

[315] *In re* Polka, No. HIP-000-00-0229, at 17 (June 17, 1987); *In re* Apakupakul, No. HIX-000-34-7009, at 32, 35 (June 1, 1987).

[316] PRO MANUAL, *supra* note 53, § 6025(C)(5).

[317] *See* Carlova, *supra* note 219, at 62.

It is, of course, improper for an administrative tribunal to hear a case in which it has a financial interest.[320] Courts that have addressed this allegation, however, have found that the PROs are not improperly biased in this respect. *Doyle v. Bowen*[321] noted that although contract renewals depended on meeting contract objectives, including sanctioning substandard care, it had never been suggested that the PROs should sanction physicians who were providing adequate care.[322] Moreover, *Doyle* noted that there was no evidence that individual reviewers in the case were in any way influenced by the PRO's concern about imposing an adequate number of sanctions.[323] Similarly the court in *Lavapies v. Bowen* rejected the bounty system argument and accepted the testimony of the Ohio PRO's Vice President of Finance that the HHS had never imposed a quota of sanctions.[324]

The HHS OIG has shown great interest in PRO sanction activity, which could be interpreted as pressure on the PROs. Some of the PROs have engaged in highly questionable conduct in pursuing PRO sanctions,[325] which might be attributable to overeagerness. Nevertheless, PROs that have issued no sanctions have routinely had their contracts renewed, demonstrating that no absolute quota system is in operation. This is, however, a subject to which the PROs and HHS must be sensitive in the future.

E. *Two Alternatives for Improving the PRO Sanction Process*

1. *Transfer Sanction Authority to the Inspector General and Provide Pretermination Hearings*

Many of the problems in the PRO sanction process can ultimately be traced to the difficulty of engrafting enforcement functions onto what is basically a peer monitoring and education program. The tension between enforcement and educative functions in health care regulation has been noted elsewhere.[326] An effective education program must work with problem physicians in a close consultative relationship based on the assumption that the physician wants to improve his practices if he can be taught how. An effective enforcement program assumes that there are bad as well as good physicians, and it maintains its distance from all as it attempts to effectively ferret out and prosecute the bad ones. In combining these functions, PROs have understandably tended to err on one side or the other. Several PROs have become so focused on correction, and have offered so many layers of review to assure giving problem physicians every opportunity to straighten out, that they have yet to impose a sanction. Other PROs have been overly aggressive. The basic unfamiliarity with legal due process of the physician managers of this latter group of PROs has exacerbated the inquisition-like atmosphere that physicians have experienced before them.

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[318] The California Medical Association in *Greene* obtained documents sufficiently supporting these charges to obtain further discovery of federal officials. *See* Greene v. Bowen, No. CIV S-86-0625 LKK (E.D. Cal. 1988) (order of Jan. 22, 1988, at 28); Brief for Plaintiff in Opposition to Federal Defendants' Motion to Dismiss or for Summary Judgment at 7–11, Greene v. Bowen, No. S-86-0625-LKK (E.D. Cal. 1988) (filed Sept. 14, 1987); McGRAW-HILL UTILIZATION REVIEW REPORT 3 (Mar. 24, 1988).

[319] One provider attorney with whom I spoke noted that the absence of judicial review for contract denials, 42 U.S.C. § 1320c-2(f), made the PROs even more concerned about HHS pressure to sanction providers.

[320] Marshall v. Jerrico, Inc., 446 U.S. 238 (1980); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927).

[321] 660 F. Supp. 1484 (D. Me. 1987), *rev'd on other grounds*, 848 F.2d 296 (1st Cir. 1988).

[322] *Doyle*, 660 F. Supp. at 1488.

[323] *Id.*

[324] Lavapies v. Bowen, 687 F. Supp. 1193, 1203–04 (S.D. Ohio 1988); *see also* Association of Am. Physicians & Surgeons v. Weinberger, 395 F. Supp. 125, 139–40 (N.D. Ill. 1975) (rejecting the bias charge).

[325] *See In re* Lifshutz, No. 000-44-7020, at 23–28 (Mar. 25, 1988); *Doyle*, 660 F. Supp. at 1488–89.

[326] *See* Day & Klein, *The Regulation of Nursing Homes: A Comparative Perspective*, 65 MILBANK MEM. FED. Q.

I believe that the public, physicians, and providers would be better protected if the sanction authority were withdrawn from the PROs and given to the OIG. Under this proposal PROs would retain their quality assurance functions. They would continue to monitor medical records and investigate complaints. They would continue to identify quality and utilization problems. When quality problems were identified, they would continue to require corrective action. This could include the interventions suggested by the *Third Scope of Work*: notification, education (including telephone discussions, suggested literature reading, continuing medical education, meetings, and self-education courses), intensified review, and other interventions (including concurrent predischarge review, second opinions or preadmission review, or referral to hospital infection control, tissue, or quality assurance committees).[327] It might also include other interventions used by PROs with which I spoke: requirements of limiting practice, consultation, preceptorships, attendance in a residency program, obtaining board certification, and oversight in surgery. HHS should assist in disseminating information among the PROs as to novel and successful approaches to quality interventions.[328]

When a PRO identified a gross and flagrant violation of physician or provider obligations or a failure to cooperate with or satisfactorily complete a correction plan, however, the PRO would refer the case to the OIG. It would not, as now, send a recommended sanction to the OIG, but rather it would refer the case to the OIG for investigation. The OIG would then, using its own medical resources (which it would have to create as its resources are now very limited) or borrowing experts from the PRO, conduct its own investigation and build its own case. Once it decided to proceed against a doctor for exclusion or for a monetary penalty, the provider or physician could appeal directly to an ALJ.

Appeals of exclusions or money penalties should be heard by the ALJs attached to the Departmental Grant Appeals Board. These ALJs deal routinely with sanction

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303, 307–11 (1987); Jost, *Enforcement of Quality Nursing Home Care in the Legal System*, 13 LAW, MED. AND HEALTH CARE 160, 162–63 (1985).

[327] THIRD SCOPE OF WORK, *supra* note 3, § IV(G)(1).

[328] OIG QUALITY REPORT, *supra* note 167, at ii.

appeals[329] and are more experienced in presiding over adversary proceedings than are the Social Security Office of Hearings and Appeals (OHA) judges. Appeals from the decisions of these ALJs would be to the Departmental Grant Appeals Board.[330] The sanction, however, would be effective immediately upon the decision of the ALJ.

This system would solve a multitude of problems. First, the PROs could focus on what they do best—peer review. They could also greatly simplify their current quality review procedures, which in many PROs have become impossibly labyrinthine. The May 1987 compromise has effectively given providers and physicians a full due process hearing before the PRO prior to their being sanctioned. Providers and physicians charged with committing a substantial number of substantial violations are now entitled to two hearings before the PRO. Sanctioned providers and physicians are entitled to a further de novo hearing before an ALJ after the sanction is imposed. Under the OBRA '87 amendments, rural practitioners, who have been the subject of two-thirds of PRO sanctions to date, are also entitled to an additional preliminary hearing before an ALJ before their sanctions can go into effect. Many of the PROs interpose additional levels of review, involving up to thirty-five reviewers, before a case even enters the sanction process.[331] It is difficult to believe that a system this cumbersome and time-consuming is truly protecting the public when dangerously incompetent doctors are involved.

Because a referral for investigation implicates no property or liberty interest,[332] no PRO hearing would be necessary prior to the initiation of such an investigation. Procedures imposed by the *Third Scope of Work*—an initial review by a physician advisor, a further review by a matched specialist or quality committee before a letter is sent to an attending physician or provider requesting an explanation, and a final review of the response received before a quality problem is confirmed (presumably by a specialist or committee)—would still be appropriate. These procedures assure that the PRO is fairly certain that there is a quality problem before even raising the issue with a physician or provider, and they give the physician or provider a chance to explain before a problem is confirmed. Once a problem is confirmed, however, the PRO should, without further delay or waste of resources, decide to (1) continue to profile the physician or provider, perhaps intensifying review, if the problem were minor; (2) initiate a corrective action plan if the problem were more serious but correctable; or (3) refer the problem to the OIG if it seemed serious.

The OIG, with its law enforcement experience and resources, could investigate all referrals. When the investigation substantiated problems, the OIG would seek exclusion or a fine. The OIG could deputize PRO physicians to serve as experts in investigating and presenting the case, but for this purpose they would serve as OIG, not PRO, experts. As the OIG's experts would be responsible for presenting evidence in any hearings and the sanction decision would be solely based on this evidence, there would be no problem with maintaining the confidentiality of PRO reviewers who had earlier identified the problem. If a problem were substantiated by the OIG investigation, the provider or physician would be sent a notice, and a hearing would be scheduled on an expedited basis, perhaps within sixty days. The case would be handled by attorneys from the OIG's office, who could avoid the problems that have occurred when PROs have held hearings without counsel or with less experienced counsel. As the PRO would be merely responsible for referring the case for an investigation, and not for deciding the case, the charges of bias recounted above would no longer be relevant. Hearings would be held at the regional offices to make them accessible to physicians and their attorneys.

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[329] *See* 53 Fed. Reg. 25,543 (1988) (assigning ALJs responsibility for hearing civil money penalty and exclusion appeals under most other HHS sanction statutes).

[330] *See* Civil Money Penalties Rep., Summer 1988, at 6–7 (describing the Board's ALJs).

[331] AMA PRO Executive Survey, *supra* note 136, Table 11.

[332] *Cf.* Setliff v. Memorial Hosp. of Sheridan County, 850 F.2d 1384 (10th Cir. 1988) (hospital investigation of physician does not affect property or liberty interest).

From the perspective of providers and physicians, this system should be superior because it would assure a hearing before an impartial ALJ before exclusion. Providers and physicians would no longer have to put up with the quasi-club meeting or the quasi-inquisition atmosphere that has prevailed in some PRO sanction proceedings. They would be dealing with hearing officers experienced in legal process and free from bias. Beneficiaries should welcome the proposal because it would assure that dangerous physicians would be dealt with swiftly and effectively and leave the PROs to focus on education and correction. HHS should welcome this proposal because it would give HHS more direct control over the sanction process. The OIG is already familiar with this kind of process through its experience under its section 1128(b) authority, reaffirmed by the Medicare and Medicaid Patient and Program Protection Act,[333] and should be comfortable with it. Most of all, the PROs should welcome this proposal because it would free them from their greatest headache. They would still have the ability to threaten a recalcitrant provider with a referral to the OIG, but would themselves be less the brunt of provider and physician hostility and distrust.

It is essential to this proposal that these cases be assigned to ALJs assigned to the Departmental Grant Appeals Board and not to the OHA judges who currently hear sanction cases. The primary reason for this is that OHA ALJs are not used to the expedited time frames necessary if problem providers are to be given pre-exclusion hearings.[334] Further, OHA ALJs are not used to dealing with adversarial proceedings and have approached sanction cases as though they were Social Security cases, in which they are responsible for protecting the claimant as well as for deciding the case. One example of the incorporation of Title II social security disability concepts into sanction proceedings is the *Polka* case, in which the judge gave extra weight to the testimony of the treating physician (as is normally done in disability cases), even though the treating physician was on trial.[335] HHS attempted at one point to develop a trained cadre of judges within the OHA to handle sanction cases, but turnover dispersed the group, which no longer exists. Departmental Grant Appeals Board ALJs have experience in handling sanction cases and should take over these cases as well.

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[333] 42 U.S.C.A. § 1320a-7 (West 1983 & Supp. 1988). *See supra* note 298.

[334] As was related earlier, ALJs have not met the 45-day time limit set by HHS for decisions on the pre-exclusion hearings required by the Hall Amendment of OBRA '87. A recent OIG report notes that final decisions in exclusion cases take even longer. It is currently taking about 15 months from the date of a PRO sanction recommendation and 10 months from an OIG sanction recommendation to the conclusion of an ALJ hearing. OIG SANCTION REPORT, *supra* note 6, at 16, 18.

[335] *In re* Polka, No. HIP-000-00-0229, at 17 (June 17, 1987).

Two final proposals should be considered as ancillary to this larger proposal. First, the OIG should be given summary suspension power for egregious cases, as is possessed by many state medical boards.[336] This would operate much like a temporary restraining order to remove a clearly dangerous doctor from practice for a short period of time (fifteen to thirty days) until an expedited hearing could be held.

Second, if the proposal suggested above were adopted, the OIG would effectively become a national medical board to protect Medicare beneficiaries. It may be advisable for the OIG to have such authority, as there is ample evidence that the medical boards of many states have not been effective in disciplining the profession.[337] When medical boards are effective, however, it might make sense to have a procedure, such as appears in some civil rights and environmental laws, to permit the OIG to certify the state procedures as equivalent in effectiveness to the federal procedures and have the PROs refer cases to the state medical board for investigation rather than to the PRO.

2. *Retain Current System, but Streamline and Assure Due Process*

While there is much to commend the idea of shifting the sanction authority to the OIG, it is also likely to face opposition. The PROs may worry that they will lose their most important lever for securing cooperation from recalcitrant providers and physicians. Providers and physicians may be concerned with the fairness of the proposed process, given their suspicions regarding the current Inspector General. Beneficiaries may be anxious about the added delay that the proposal could add to the process, which already takes too long. The OIG can be expected to object that unless substantial additional resources were offered to it, it could not adequately handle the additional responsibility. While these objections are not insurmountable, they do counsel consideration of a more cautious approach.

Such an approach should be adequate to address, on the one hand, the concern of providers and physicians that the current system does not guarantee them access to an undisputably impartial presanction decisionmaker and is excessively uneven in its results and, on the other hand, the concern of beneficiaries that the current process has been too much consumed with bureaucratic delay.

First, the twenty-day notice and opportunity to submit additional information or discuss the problem with the PRO, provided by 42 C.F.R. section 1004.40 for cases involving a substantial number of substantial violations, should be abolished. It no doubt made sense at one time, when many PROs still had abbreviated procedures and the thirty-day notice meeting provided by section 1004.50 was quite perfunctory, to give physicians and providers with a pattern of problems an early opportunity to explain or correct their behavior. The current *Scope of Work* provides thirty days notice and an opportunity to discuss problems as part of the presanction quality assurance process.[338] It also focuses PROs on corrective interventions rather than sanctions for remediable problems.[339] The May 7, 1987, compromise procedures substantially enhance the protections available to providers and physicians in the thirty-day notice hearing. Under these circumstances, the additional twenty-day opportunity for discussion under section 1004.40 seems redundant and an unnecessary cause of delay.

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[336] *See* OHIO REV. CODE ANN. § 4731.22(D) (Anderson 1987); FEDERATION OF STATE MEDICAL BOARDS, A GUIDE TO THE ESSENTIALS OF A MODERN MEDICAL PRACTICE ACT 18 (1977), *reprinted in* H.R. 5110, 99th Cong., 2d Sess. 409 (1986).

[337] *See* OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF HEALTH & HUMAN SERVS., MEDICAL LICENSURE AND DISCIPLINE: AN OVERVIEW 12–15 (1986), *reprinted in* H.R. 5110, 99th Cong., 2d Sess. 256–59 (1986) [hereinafter OIG LICENSURE & DISCIPLINE REPORT]; Rayack, *Medical Licensure: Social Costs and Social Benefits*, 7 LAW & HUM. BEHAV. 147, 154–57 (1983).

Second, the *Third Scope of Work* should be clarified to assure that the sanction process is initiated immediately upon the confirmation of a quality problem, if it is a problem for which a sanction is the appropriate intervention. Section V(B) of the *Third Scope of Work* requires PROs to issue a final notification to an attending physician or provider within a maximum of seventy-five days of the identification of a problem by a physician advisor.[340] During this period the problem must be reviewed by the initial physician advisor and a separate specialist or quality committee, and the physician or provider must be notified of the problem and given an opportunity to discuss it. The confirmed problem will usually not be sufficiently serious to warrant a sanction, in which case some other intervention, such as education or intensification, will be appropriate.[341] If the problem is sufficiently severe to warrant a sanction, however, the PRO should move immediately into the section 1004.50 process, with the thirty-day notice serving to begin the process. Further delays for further committee reviews or discussions cannot be justified.

Third, the OIG and HCFA could do more to assure greater reliability and uniformity in the sanction process. Training sessions should be offered, for example, by the OIG to lawyers representing PROs to make certain that they understand the procedures the PROs must follow in the sanction process and to educate them as to errors that commonly result in OIG rejection or ALJ reversal. Model forms could be developed by HCFA to help assure that the PROs address the factors enumerated in sections 1004.80 and 1004.90, which must be considered by the PRO and by the OIG in imposing sanctions.

Under this alternative proposal, once the PRO initiated a Medicare exclusion and the OIG confirmed it and gave notice to the physician or provider, an exclusion would go into effect within fifteen days, as provided under the current regulations.[342] The physician or provider could, however, within ten days request a stay of the exclusion, as is currently possible for rural physicians and providers under the Hall

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[338] THIRD SCOPE OF WORK, *supra* note 3, § V(B), at 6.

[339] *See generally id.* § V, at 5–15.

[340] *Id.* § V(B), at 6.

[341] *Id.* §§ V(G)(3)–(4), at 12–13 (which gives guidance to PROs as to the circumstances in which a sanction is appropriate).

[342] 42 C.F.R. § 1004.100(b) (1987).

Amendment,[343] if the stay would pose no serious threat to the patients of the physician or provider. The proposal would, however, establish uniform procedures for all, recognizing that there is no defensible reason for distinguishing between rural and urban physicians or providers. It would place the burden of proof on physicians or providers to show that their continued participation in the Medicare program would not pose a serious risk to their patients. By the time the sanction proceeding reaches this point, the physician or provider has already had at least three opportunities to explain the problem on which the sanction is based—once in the quality assurance process, again at the formal meeting with the PRO (to which lawyers and witnesses can be brought), and again when the case is referred to the OIG. Both the PRO and OIG, considering all of the information presented by the physician or provider through this process, have concurred that exclusion is appropriate because either a gross and flagrant violation or a substantial number of substantial violations has been confirmed. At this point it is proper that the provider or physician establish why, in spite of this, the exclusion should be stayed. If the provider or physician asks for such a stay, the effective date of the exclusion should be delayed for thirty days, during which the ALJ should consider the record and any additional information supplied by the physician, provider, OIG, or PRO. The ALJ should render its decision on the stay within thirty days. Regardless of the decision reached by the ALJ on the stay issue, the ALJ should reach a final decision on the merits within one year to assure that, on the one hand, the stay does not continue indefinitely or, on the other hand, that the exclusion is not stayed for an excessive period of time.

VI. Denials of Payment for Substandard Care

COBRA '85 amended the PRO legislation to require that PROs deny payment for services provided Medicare beneficiaries when the quality of those services does not meet professionally recognized standards of health care.[344] The amendment further required that such denials should be made only "on the basis of criteria which are consistent with guidelines established by the Secretary."[345] This provision has proved intensely controversial, and two-and-one-half years after its enactment it has still not been implemented by HHS, although proposed regulations have been published very recently.[346]

The judgment of Congress that the Medicare program ought not to pay for poor quality care provided to Medicare beneficiaries makes a great deal of sense. It also makes sense to notify beneficiaries if the PRO peer review process concludes that the beneficiary has been provided substandard care. Hospitals and doctors fear that the PRO notification of substandard care denials may lead to increased malpractice litigation. But if a patient has been injured by poor quality medical care, he or she has a legal right to sue for redress for the injury. It is difficult to understand why the PRO should assist in covering up the fact that such a patient has received substandard care.

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[343] 42 U.S.C.A. § 1320c-5(b)(5) (West 1983 & Supp. 1988).

[344] COBRA '85, Pub. L. No. 99-272, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 83, 200 (to be codified at 42 U.S.C. § 1320c-3(a)(2)).

[345] OBRA '87 further provides that the PRO shall not disapprove payment until 20 days after the PRO has notified the affected provider or practitioner and afforded an opportunity for discussion and review, Pub. L. No. 100-203, 1987 U.S. Code Cong. & Admin. News (101 Stat.) 1330, 1330-135 to -136 (to be codified at 42 U.S.C. § 1320c-3(a)(3)), and prohibits physicians from charging beneficiaries for services for which payment is denied because of substandard quality. *id.* at 1330-139 (to be codified at 42 U.S.C. § 1395u).

[346] *See* Proposed Substandard Care Regulations, *supra* note 61. For discussions of the reasons for the long-delayed issuance of the proposed regulations, see *Hospitals Anxious Over Payment Denials*, Hospitals, June 20, 1987, at 48, 53; *Payment Denials Spark Questions*, Hospitals, June 20, 1987, at 32; *Payment will be Denied for Substandard Care*, Medical World News, Jan. 12, 1987, at 25, 26.

It is, of course, important for the PRO to be very sure that care provided a beneficiary was in fact substandard before the beneficiary is notified of this fact. The statute, however, assures physicians and providers that the PRO can only deny payment pursuant to articulated quality criteria and after notice and an opportunity for discussion.[347] Proposed regulations further protect providers by only allowing payment denials when substandard quality care has resulted in "[a]n actual, significant, adverse effect" or "[a]n imminent danger to the health, safety, and well-being of the beneficiary, or places the beneficiary unnecessarily in a high-risk situation"[348] and, in most cases, after the case has been reviewed by a specialist in the area of care at issue.[349] The proposed regulations would define "actual, significant, adverse effects" restrictively to include patient management that results in "(i) [u]nnecessarily prolonged treatment; (ii) [m]edical complications; (iii) [r]eadmission; (iv) [p]hysiological or anatomical impairment; (v) [d]isability; or (vi) [d]eath."[350]

The delay of HHS in implementing the substandard care provision reached the level of unconscionability and, perhaps, illegality. In other contexts, excessive administrative delay has been challenged by the courts.[351] If the proposal made earlier in this Article to transfer sanction authority to the OIG were adopted, it would become even more important that PROs have the power to deny payment for substandard care in order to assure them some ability to respond directly to poor quality providers and practitioners. HHS's proposed regulations, therefore, should be implemented expeditiously.

Though the problems addressed by the NPRM as to how to evaluate the quality of medical care are largely beyond the scope of this Article, one comment will be made here. HHS should reconsider its proposal to notify beneficiaries only that payment is being denied because care was substandard and not to reveal the specific reason for the decision.[352] The draft rule of HHS mandates that payment only be denied when care is significantly deficient and results in actual significant adverse effects or an imminent threat to the patient. In these circumstances, the beneficiary deserves to be told the nature of the substandard care, both to allow the beneficiary to take necessary remedial action to deal with the threatened or actual adverse effects and to relieve, or at least to focus, anxiety that the beneficiary may suffer from receiving a general notice that he or she has received dangerously deficient care. A more specific notice may result in marginally more negligence litigation, but after all, the PRO program exists to protect the beneficiary, not the physician.

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[347] 42 U.S.C. § 1320c-3(a)(2)-(3) (1982 & Supp. IV 1986).

[348] PROPOSED SUBSTANDARD CARE REGULATIONS, *supra* note 61, at 1963 (to be codified at 42 C.F.R. pt. 462, § 466.100(b)(4)(i), (ii)).

[349] *Id.* (to be codified at 42 C.F.R. pt. 462, § 466.98(a)(4)).

[350] *Id.* (to be codified at 42 C.F.R. pt. 462, § 466.100(b)(4)(i)).

[351] *See* Nader v. FCC, 520 F.2d 182, 206 (D.C. Cir. 1975); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093, 1099 (D.D.C. 1970) (holding that agency inaction over a prolonged period of time can warrant judicial intervention).

[352] PROPOSED SUBSTANDARD CARE REGULATIONS, *supra* note 61, at 1960.

VII. PRO Investigations of Beneficiary Complaints

From the beginning, PROs have based their quality review activities primarily on the hospital records they assemble through the sampling protocols described in Part II.[353] OBRA '86 required PROs to consider a new source of data for identifying health care quality problems: beneficiary complaints.

Section 9353(c) of OBRA '86 requires that PROs:

> Conduct an appropriate review of all written complaints about the quality of services (for which payment may otherwise be made under title XVIII) not meeting professionally recognized standards of health care, if the complaint is filed with the organization by an individual entitled to benefits for such services under such title (or a person acting on the individual's behalf). The organization shall inform the individual (or representative) of the organization's final disposition of the complaint. Before the organization concludes that the quality of services does not meet professionally recognized standards of health care, the organization must provide the practitioner or person concerned with reasonable notice and opportunity for discussion.[354]

HHS has implemented this provision through a modification in the contract and the *Third Scope of Work* and only very recently has proposed an implementing regulation. Under the *Third Scope of Work*, PROs are to investigate complaints about hospital inpatient or outpatient care, skilled nursing services, home health agencies, and ambulatory surgical centers.[355] PROs may only investigate written complaints. Once a complaint is received, the PRO must determine whether the complainant is a beneficiary or beneficiary representative, whether the services were provided in a Medicare-certified facility or part of a facility, and whether the services complained of are covered by Medicare (whether or not they were covered for this particular beneficiary).[356]

Once the PRO determines it has jurisdiction over the complaint, it initially assesses the complaint to determine if investigation is warranted. If the PRO determines that the complaint has merit, it must request the beneficiary's medical records within fifteen calendar days.[357] The facility has thirty calendar days to provide the record.[358] The PRO review must be completed within fifteen calendar days thereafter if no quality problem is identified.[359] If a quality problem is found, however, the PRO must contact the physician or provider and afford another thirty days for discussion.[360] Within five days after the review is completed, the PRO must respond to the beneficiary. Finally, if the PRO identifies a quality problem, it may initiate sanctions or otherwise proceed through its quality assurance process, and it must notify the regional office.[361]

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[353] *See supra* text accompanying notes 38–40.

[354] OBRA '86, Pub. L. No. 99-509, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 1874, 2047 (to be codified at 42 U.S.C. § 1320c-3(a)).

[355] Third Scope of Work, *supra* note 3, § XVII(A), at 36–38.

[356] *Id.* § XVII(A)(1), at 36.

[357] *Id.* § XVII(A)(4)(a), at 37.

[358] *Id.* § XVII(A)(4)(b), at 37.

[359] *Id.* § XVII(A)(4)(c), at 37.

The *Third Scope of Work* places two restrictions on the PRO's duty to respond to the complaining beneficiary. First, it requires that under certain circumstances the response should be to someone other than the beneficiary. The *Third Scope of Work* provides that within the review time frames set out above the PRO must contact the attending physician of the patient whose care is the subject of the complaint fifteen days before disclosing information to the patient, as provided by 42 C.F.R. section 476.132. Section 476.132 addresses disclosure to patients of information concerning themselves. It requires the PRO to seek the advice of attending practitioners regarding the appropriateness of releasing information to a patient. More particularly, it requires that, when an attending physician believes that disclosure may harm the patient, the PRO must disclose the information to the patient's designated representative rather than to the patient or, when the patient is mentally, physically, or legally unable to designate a representative, to a person the PRO determines to be "responsible for the patient."[362]

Second, the *Third Scope of Work* differentiates between physicians and providers as to the appropriate PRO response to a beneficiary complaint. If the complaint involves a facility, the PRO must inform the beneficiary as to quality deficiencies it has discovered and corrective action it requires.[363] It must include within this notice any comments the facility made during the thirty-day discussion period. If the quality problem involves a physician, however, the PRO may only provide "[a] general response that assures the beneficiary that a thorough investigation of his/her complaint is being conducted and that corrective action will be taken when a problem is found."[364]

The PROs have received few complaints through this process. How few is not known, as HCFA does not collect data on complaints. Thirty-eight PROs that responded to a survey conducted by PRONET, an organization of PRO beneficiary representatives, reported receiving a total of 651 quality complaints between October 1, 1987, and the fall of 1988, with a range of 0 to 97 complaints and an average of 18 complaints.[365] Knowledgeable persons with whom I spoke, moreover, confirmed the results of my own less formal survey: most PROs receive from five to forty complaints a month.

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[360] *Id.* § XVII(A)(5), at 37.

[361] *Id.* § XVII(A)(7), at 38.

[362] 42 C.F.R. § 476.132(c) (1987). The incorporation of 42 C.F.R. § 476.132(c) is maintained by the proposed regulations. *See* PROPOSED SUBSTANDARD CARE REGULATIONS, *supra* note 61, at 1964 (to be codified at 42 C.F.R. pt 462, § 466.106(b)).

[363] THIRD SCOPE OF WORK, *supra* note 3, § XVII(A)(6)(a), at 37.

[364] *Id.* § XVII(A)(6)(b), at 38. This will apparently be changed if the proposed regulations for review of beneficiary complaints are implemented, as they permit disclosure of physician-specific information to beneficiaries. *See* PROPOSED SUBSTANDARD CARE REGULATIONS, *supra* note 61, at 1960, 1964 (to be codified at 42 C.F.R. pt. 476, subpt. B, § 476.133(b)(4)).

[365] PRONET, BENEFICIARY WRITTEN QUALITY COMPLAINT SURVEY 2–3 (1988).

The paucity of complaints is not surprising. First, few beneficiaries are aware that the PROs are available to receive complaints. Community outreach is a growing emphasis of the PROs. Under the *Third Scope of Work*, PROs must submit a detailed community outreach plan, which includes such components as a toll-free number (which several of the PROs already have), educational programs and seminars, and publication of informational materials.[366] The PROs, however, still have far to go. Several representatives of beneficiary groups complained to me of the difficulties consumers have encountered in locating anyone at their PRO who is willing or able to take a complaint. One said that if a person from their organization calls a PRO to make a complaint, the PRO does not know what they are talking about.

Second, the statutory requirement that the complaint be in writing undoubtedly deters many complaints. PROs responding to the PRONET survey reported receiving 3036 total complaints by telephone, but only 944 in writing.[367] Medicare beneficiaries with current or recent experiences of unsatisfactory medical care are often feeble and debilitated. Making a phone call to a PRO to present a coherent complaint requires a major effort. If the PRO tells the caller that the complaint can only be investigated if it is received in writing, the complainant must make a substantial additional effort, which probably will not be forthcoming. Many beneficiaries also interpret such a response to mean that the PRO is an uncaring bureaucracy, which is not interested in the complaint and will not take it seriously.

One PRO with which I spoke attempts to deal with this problem by assisting the complainant in drafting the complaint while on the phone. HCFA or the PROs could also develop a form that could be immediately sent to complainants to fill out, with a stamped return envelope, or that could be completed by the PRO with information gained from the phone call.[368] Only two PROs reported to PRONET that they assisted complainants by filling out a complaint form based on the verbal complaint and sending it to the complainant for verification and signature.[369] A more sensible move would be to remove the requirement of a writing altogether. It serves no obvious function other than perhaps to deter some frivolous complaints. Though screening is undoubtedly necessary to eliminate vague or unsubstantiated complaints, PROs should be willing to investigate specific oral complaints.[370]

Third, HCFA should amend its instructions to the PROs to assure protection of the confidentiality of complainants.[371] Under complaint investigation procedures required by the *Third Scope of Work*, a provider or practitioner being investigated will be able to discover immediately the identity of the complainant because the PRO will request specifically the record of the complainant and a response to the complaint. But the PRO is required even to go beyond this and to request specifically the attending physician's opinion as to whether the complainant is sufficiently stable to receive information resulting from the complaint investigation.

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[366] Third Scope of Work, *supra* note 3, § XVI(C), at 34.

[367] PRONET, *supra* note 365, at A1. This total includes both the quality-related and nonquality-related complaints.

[368] *See* Letter, *supra* note 172, at 2–3. One HCFA representative with whom I spoke affirmed this idea but suggested the PROs do it as they, unlike HCFA, are not subject to the Paperwork Reduction Act and thus can develop new forms more quickly.

[369] PRONET, *supra* note 365, at A1.

[370] *Cf.* Cal. Health & Safety Code § 1419 (West 1979 & Supp. 1988) (complaints involving nursing homes may be submitted in writing, by telephone, or by personal visit; oral complaints shall be reduced to writing by the Department of Health); Ill. Ann. Stat. ch. 111 1/2, ¶ 4153-702(a) (Smith-Hurd Supp. 1988).

[371] The Senate version of the complaint investigation provision included a requirement for protecting the

The exposure of the complainant's identity throughout the process not only serves to discourage complaints, but it may also actually put some complainants at risk for their health and safety. Two representatives of beneficiaries with whom I spoke noted that the PRO's practice of informing skilled nursing facilities (SNFs) of the identity of residents who had complained about conditions in the SNF could be dangerous to the complainant. The vulnerability of nursing home residents to physical and mental abuse is widely acknowledged[372] and has been recognized in state nursing home laws protecting the confidentiality of complainants.[373] Yet even when care in the hospital is involved, and abusive retaliation is less likely, the elderly, debilitated patient or her family may fear that care will suffer further if the provider or physician becomes aware that the patient has complained to the PRO. One interviewee noted the tenuous nature of contemporary physician/patient relationships and expressed the opinion that few beneficiaries would risk this relationship to complain of problems without strict protection of confidentiality.

Given the broad powers the PROs have to monitor care in institutions under their jurisdiction, they could easily investigate complaints while protecting the identity of complainants. A PRO, for example, could request a facility that was the subject of a complaint to provide the records of ten patients, including the complainant and nine others chosen at random. Indeed, a PRO could intensify review of a particular provider or physician, reviewing all cases or all cases in a particular area. If a problem were identified, the PRO could then approach the provider with a pattern of cases, no one of which would be identifiably linked to a complainant. If it became absolutely necessary at some point in a proceeding to identify a complainant, the complainant could be offered the opportunity (afforded by a number of state nursing home laws) to withdraw the complaint rather than be put at risk.[374]

The *Third Scope of Work* provision that allows a physician target of a complaint to decide whether a complainant is capable of receiving information about the

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confidentiality of the complainant. This requirement was deleted without comment by the Conference Committee. *See* CONF. REP. 1012, 99th Cong., 2d Sess. 360–61. This does not necessarily preclude HCFA from establishing confidentiality requirements, as they have elsewhere in the PRO program, *see* 42 C.F.R. § 473, but may argue in favor of the need for a statutory, and not just a regulatory, change.

[372] *See* Stannard, *Old Folks and Dirty Work: The Social Conditions for Patient Abuse in a Nursing Home*, 20 SOC. PROBS. 329 (1973).

[373] CAL. HEALTH & SAFETY CODE § 1419 (West 1979 & Supp. 1988); ILL. ANN. STAT. ch. 111 1/2, ¶ 4153-702(c) (Smith-Hurd 1988); IOWA CODE ANN. § 135C.37 (West Supp. 1988); MICH. COMP. LAWS ANN. § 333.21799a(3) (West 1980); A.B.A. MODEL RECOMMENDATIONS: INTERMEDIATE SANCTIONS FOR ENFORCEMENT OF QUALITY OF CARE IN NURSING HOMES 33, 37, 40 (1981).

[374] *See* ILL. ANN. STAT. ch. 111 1/2, ¶ 4153-702 (Smith-Hurd 1988); MICH. COMP. LAWS ANN. § 333.21799a(3) (West 1980).

investigation is particularly offensive, indeed bizarre, and it should be deleted as soon as possible.

It is ironic that although the PRO *Third Scope of Work* offers no protection for the confidentiality of complainants, it goes so far in protecting the privacy of problem physicians that it actually violates the statute. This is a fourth problem with implementation of the beneficiary complaint investigation requirement. OBRA '86 requires that the PRO "shall inform the individual (or representative) of the organization's final disposition of the complaint."[375] The *Third Scope of Work*, however, ever solicitous to protect the reputation of physicians, only allows the PRO to give the beneficiary an evasive report that an investigation is being conducted and corrective action, if necessary, will be taken. This response is contrary to the requirements of the statute that the PRO explain its "final disposition."[376] Moreover, it is likely to discourage complainants, who may be reluctant to pursue a complaint without any possibility of discovering its disposition. It is hoped that this problem will be cleared up by the proposed regulations, which seem to permit disclosure of physician-specific information.[377]

Fifth, representatives of beneficiary organizations with whom I spoke also believe that beneficiaries are discouraged from complaining by the cumbersomeness of the process. For example, most PROs define "quality" issues quite narrowly and refuse a significant proportion of complaints lodged with them as inappropriate.[378] By contrast, two of the PROs with which I spoke pursued nearly all complaints lodged with them and were quite successful, for example, in straightening out billing and coverage disputes for their beneficiaries. This should be the norm, not the exception.

Next is the problem of delay. Under the process outlined above, it can take the PRO nearly three months to investigate a complaint. Contrast this with state nursing home complaint investigation statutes requiring investigation of abuse and neglect complaints to be completed within seven days, or within twenty-four hours if a resident's life or safety is imminently threatened, and all other investigations within thirty days.[379] While the statute requires that practitioners and providers must be given "reasonable notice and opportunity for discussion" before the PRO concludes that their services were of poor quality, the length of time that is reasonable in any particular case should be determined considering the seriousness of the complaint.[380]

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[375] OBRA '86, Pub. L. No. 99-509, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1874, 2047 (to be codified at 42 U.S.C. § 1320c-3(a)).

[376] 42 U.S.C. § 1320c-3(a)(9) requires confidentiality of PRO data generally and permits disclosure to the extent necessary "to carry out the purposes of this part." Here disclosure is clearly necessary.

[377] *See supra* note 364. Again, it is instructive to consider nursing home statutes that not only require the investigative agency to give the complainant a full accounting of its investigation, but also allow the complainant an opportunity to appeal if dissatisfied with the result. *See* ILL. ANN. STAT. ch. 111 1/2, ¶ 4153-702(g) (Smith-Hurd 1988); A.B.A. MODEL RECOMMENDATIONS, *supra* note 373, at 37.

[378] The PRONET survey discovered that some PROs consider nearly all complaints to be quality complaints, others only a very small percentage. Two PROs classified only 3% of the complaints they received as quality complaints. PRONET, *supra* note 365, at 3.

[379] ILL. ANN. STAT. ch. 111 1/2, ¶ 4153-702 (Smith-Hurd 1988).

[380] HCFA's recent proposed regulations require PROs to allow practitioners or institutions 30 days to respond to complaints prior to notification to beneficiaries, further slowing the process. *See* PROPOSED SUBSTANDARD CARE REGULATIONS, *supra* note 61, at 1964 (to be codified at 42 C.F.R. pt. 462, § 466.106(a)). That PROs are capable of greatly

Several beneficiary representatives complained more generally that the PROs will not communicate with complainants once the complaint is lodged and that they tend to dismiss complainants and complaints too readily. One stated that an individual beneficiary would seldom be able to pursue a complaint to a successful conclusion without strong support from a determined family or beneficiary organization. Others complained of the limited scope of PRO complaint investigations—they are generally restricted to the facility record and ignore care received in doctors' offices or following hospitalization. Finally, once PROs identify problems, there is often little they can do to solve them. With nursing homes or home health agencies, for example, the PRO may well end up referring a confirmed problem to the state licensing and certification agency, which could have handled the initial complaint more rapidly and with less danger to the complainant if the complaint had simply been forwarded to it in the first place.

This final observation highlights a basic problem with the PRO complaint investigation procedure: recent federal and state consumer protection initiatives are building a reticulate, and sometimes redundant, system for beneficiary protection. OBRA '87, for example, requires investigation of complaints involving nursing homes and home health agencies at the state level.[381] All states have physician licensure agencies, most license hospitals, all license nursing homes, all have nursing home ombudsmen programs. Until recently, the PRO role in this network of survey and enforcement agencies has been to monitor hospital data on an ongoing basis and to study and correct problems identified through that monitoring process. The complaint investigation requirements of OBRA '86 require PROs to take on an additional new identity, much more closely akin to traditional law enforcement. This may be appropriate in some settings, such as hospitals, in which PROs have extensive experience and in which there are few alternatives to which the beneficiaries can turn. It is less appropriate in the nursing home setting, in which other modes of state and federal regulation are more established and PROs have little experience.[382] PROs will not easily become comfortable in this new role, and if they are to take it on effectively, HCFA will have to give more leadership than it is currently offering.[383]

VIII. HOSPITAL NOTICES OF NONCOVERAGE

With the DRG PPS Medicare reimbursement system came a fear that the new system would create incentives for hospitals to discharge patients "sicker and quicker."[384] Because hospitals are paid on a per admission basis, it was thought they

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expedited review is demonstrated by the notice of noncoverage procedures, discussed in Part VIII below, under which decisions are rendered in three days or less.

[381] OBRA '87, Pub. L. No. 100-203, §§ 4025, 4202(a)(2), 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 1330, 1330-74, 1330-174 to -179 (to be codified at 42 U.S.C. § 1395x(v)(1)(L), 1395aa(d)).

[382] *See* INSTITUTE OF MEDICINE, *supra* note 304, at 146–70.

[383] A draft manual transmittal addressing the PRO complaint investigation authority attempts to describe the kinds of problems PROs should address and those they should refer to others to investigate. This is a step in the right direction. In fact, only 59 of the 517 classified quality complaints received by the PROs identified in the PRONET survey pertain to nursing homes. PRONET, *supra* note 365, at A1.

[384] *See Examination of Quality of Care Under Medicare's Prospective Payment System: Hearings Before the*

would attempt to discharge patients as quickly as feasible to reduce their costs and increase their profits. The PROs, as Medicare's primary bulwark against erosion of the quality of medical care, were quickly brought in to assist in assuring that Medicare beneficiaries were not discharged until discharge was medically appropriate. Resulting legislation, regulations, and manual provisions have created a terribly complex process that has left beneficiaries confused and their representatives frustrated.

OBRA '86 created the basic framework under which PROs review hospital notices of noncoverage. If a hospital determines that a Medicare beneficiary no longer needs inpatient care, and the patient's attending physician agrees, the hospital may give the patient a notice of this determination.[385] This notice is called a notice of noncoverage, because it is effectively a notice that hospitalization is no longer necessary and, therefore, no longer covered by Medicare.[386] If a hospital gives this notice, and the patient refuses to leave, the hospital may begin charging the patient directly for his or her care after the second day following the date of the notice (after two "grace days").[387]

The patient may, however, request the PRO to review the hospital's determination. If the patient requests the review no later than noon of the first working day after the date he or she receives the hospital notice, the hospital must provide the PRO with the patient's records by the close of that day.[388] The PRO must then review these records and discuss the discharge with the patient and the patient's attending physician.[389] The PRO must complete its review by the close of the next full working day after it has received the records[390] and then send a notice to the patient and hospital of the results of its review. If the patient makes a timely request for review, the hospital may not charge the patient for inpatient hospital services received prior to noon of the day after the patient receives notice of the PRO decision.[391] Of course, if the PRO decides that discharge is medically inappropriate, the hospital cannot charge the patient until discharge is appropriate.[392]

If the hospital determines that inpatient care is no longer needed, but the attending physician disagrees, the hospital may ask the PRO to review its determination.[393] The hospital may not charge the patient until the PRO rules in its favor. If the PRO rules in favor of the hospital, and against the attending physician, the hospital may issue a notice of noncoverage. The patient may then request the PRO to reconsider its earlier decision. The PRO must complete this reconsideration within

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Senate Comm. on Fin., 99th Cong., 2d Sess. 114, 142, 276, 290 (1986); *Quality of Care Under Medicare's Prospective Payment System: Hearings Before the Senate Special Comm. on Aging*, 99th Cong., 1st Sess. 363–65 (1986) (Vol. I).

[385] 42 U.S.C. § 1320c-3(e)(1) (1982 & Supp. IV 1986).

[386] *Id.*

[387] 42 C.F.R. § 412.42(c)(3)(ii) (1987).

[388] 42 U.S.C. § 1320c-3(e)(3)(B) (1982 & Supp. IV 1986).

[389] *Id.* § 1320c-3(e)(5); PRO MANUAL, *supra* note 53, §§ IM4120, IM4130.

[390] 42 U.S.C. § 1320c-3(e)(3)(B) (1982 & Supp. IV 1986).

[391] *Id.* § 1320c-3(e)(4).

[392] 42 C.F.R. § 412.42(c)(4) (1987).

[393] 42 U.S.C. § 1320c-3(e)(2) (1982 & Supp. IV 1986). Under a provision of OBRA '87, it must notify the patient that it has done so.

three days.[394] As the hospital may begin charging the patient after the two grace days elapse, however, the patient may have to pay for the final day of the reconsideration.

The Medicare statute also requires that hospitals give beneficiaries a description of these appeal rights at the time they are admitted.[395] The *Medicare Hospital Manual* requires that this statement be a copy of a document entitled "An Important Message from Medicare." The PROs are to monitor hospitals to be sure that they, in fact, give beneficiaries this notice.[396] Under a rule proposed in June 1988, the hospital would have to "obtain a separate signed acknowledgement from the beneficiary attesting to the receipt of the statement, and maintain a copy of the acknowledgement."[397] Finally, the PRO is responsible for reviewing all cases in which the hospital charges a patient for care after a notice of noncoverage is sent.[398] If the PRO determines that the notice of noncoverage was inappropriate, the hospital must refund inappropriately collected charges.[399] The PRO regulations and *Medicare Hospital Manual* also provide for an expedited three-day appeal process when a hospital or PRO denies a patient admission to a hospital on the grounds that the admission is not covered by Medicare because it is not for necessary care.[400]

If the procedures described in the preceding paragraphs seem confusing to the reader, imagine how they must seem to an elderly Medicare beneficiary who has just been admitted to a hospital or is just about to be prematurely discharged. Beneficiary representatives with whom I spoke uniformly complained that HCFA's "An Important Message from Medicare" was unintelligible to many beneficiaries and, until recently, in error. Moreover, most beneficiaries are unaware of the "Important Message," which is generally handed to them with a sheaf of other admission papers at a time when they are obviously distracted by other concerns. One recent survey revealed that 82% of beneficiaries claimed that they had not received the notice at admission.[401] An AARP study of persons over sixty-five who had been hospitalized in 1987 found that more than half of the respondents (56%) either believed that they had not received the notice or did not know whether they had received it or not.[402] Several beneficiary representatives with whom I spoke claimed that hospitals seldom give patients notice of noncoverage, preferring to work with the doctor to convince the patient to leave without threatening to make the beneficiary pay for the care.[403]

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[394] 42 C.F.R. § 473.32(a)(1) (1987).

[395] 42 U.S.C. § 1395cc(a)(1)(M) (1982 & Supp. IV 1986). These provisions are implemented by 42 C.F.R. § 466.78(b)(3).

[396] MEDICARE HOSP. MANUAL, *supra* note 56, § 312.1; PRO MANUAL, *supra* note 53, § 2005.

[397] 53 Fed. Reg. 22,523 (1988) (to be codified at 42 C.F.R. § 498.27) (proposed June 16, 1988).

[398] PRO MANUAL, *supra* note 53, § IM2080.

[399] 42 C.F.R. § 412.42(c)(3)(v) (1987).

[400] *See id.* § 473 32(a)(1); Wilson, *How to Appeal Medicare Hospital Coverage Denials Under the DRG System*, 20 CLEARINGHOUSE REV. 434 (Summer 1986).

[401] Conversation with Laura Schoenberg, Pennsylvania Public Interest Coalition.

[402] AARP, DRAFT OF SURVEY BY MARKETFACTS 5 (1988).

[403] In fact, PRO data reveal that the extent of issuance of hospital notices varies significantly from PRO to PRO. New York hospitals had issued 39,726 notices as of June 1988, Washington hospitals only 10. The extent of PRO disagreement with the hospital also varied significantly, from a disagreement rate of 41% in Michigan and 44% in Delaware, to 3% in Minnesota, Montana, and Maine. HEALTH CARE FIN. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., MONTHLY PEER REVIEW ORGANIZATION (PRO) DATA SUMMARY D3 (Sept. 8, 1988) [hereinafter PRO DATA SUMMARY].

Though hospitals must all disseminate the "Important Message" at admission, they can draft their own notices of noncoverage to give at discharge, and these vary significantly, some not explaining the patient's rights at all.

The most important issues in this area concern whether the beneficiary should always be entitled to a liability-free appeal to the PRO, when the beneficiary should be given a notice of his or her rights, and what the notice should say. As described above, if the hospital notifies the beneficiary that it and the beneficiary's physician concur that the beneficiary should be discharged, and the beneficiary appeals by noon of the next day, the beneficiary cannot be charged for care until the PRO rules on the appropriateness of the discharge. If, however, the hospital and the physician disagree, the hospital requests PRO review, the PRO rules in favor of the hospital, the hospital issues a notice of noncoverage, and the beneficiary requests PRO reconsideration, the beneficiary may end up paying for a day of care while awaiting the PRO decision.

This two-track process is responsible for much of the complexity of the "Important Message" and the confusion of the current process. Surely the cost to the hospitals of the extra day of care in the latter situation, which cannot be too common, does not justify this added confusion and complexity. Alternatively, PROs reviewing beneficiary appeals, when they have already ruled on the disagreement between the doctor and hospital, should be able to reconsider their decision within the two grace days, because they already have the records and have talked to the parties during the prior review. In any event, it should be possible to provide the beneficiary with a liability-free review by the PRO. OBRA '86 only provided a liability-free appeal from notices of noncoverage when the hospital and physician concurred. OBRA '87 appeared to assure a liability-free appeal for all beneficiaries, regardless of physician concurrence or nonconcurrence in the original decision, but a technical correction to OBRA '87, found in the Catastrophic Coverage Act, restored the two-track system.[404] The statute should be amended to assure that every beneficiary who receives a notice of noncoverage, and who appeals by noon of the next day to the PRO, is entitled to remain in the hospital without additional charge until the PRO decides the appeal.

If it is the intent of HHS to make beneficiaries aware of their rights, it is troubling to rely on information concerning these rights given beneficiaries at the time of admission, when most beneficiaries (and their representatives) are overwhelmed with the anxiety of a hospital admission and other paperwork connected with the hospital stay. Even having the beneficiary or representative sign the notice will help little, as the notice will remain only one more paper to be signed as part of the admission process. Notice of beneficiary rights should, therefore, also be given as part of the discharge planning process.[405]

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[404] Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, § 4096, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 683, 791 (to be codified at 42 U.S.C. § 1320c-3(e)(3)(A)(i), 1320c-3(e)(2)(B)) (to be amended by a subsequent technical correction striking "before 'paragraph (2)' " in Family Support Act, Pub. L. No. 100-485, § 608, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 2343, 2421 (to be codified at 42 U.S.C. § 1320c-3)).

[405] Section 9305(c) of OBRA '86, Pub. L. No. 99-509, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 1874,

At the time a hospital or attending physician determines that a Medicare patient no longer needs hospital care, the patient ought to be given notice of this decision and of his or her rights under the law. This information should be given the patient as soon as possible after it is determined that the patient is ready for discharge and at an early enough point to allow the patient to exercise his or her rights. The notice should be provided to the beneficiary by his or her own physician or by an employee of the hospital responsible for discharge planning. Alternatively, the notice could be posted on the wall near the bed in all patient rooms that are used for Medicare beneficiaries, so that the beneficiary could read it at his or her leisure. While providers may object that this procedure may lead to more appeals, it is hard to sympathize with an argument that beneficiaries should be kept ignorant of their rights to keep them from burdening the system through the exercise of those rights.

The notice given the patient should be as simple as possible.[406] It need only tell the patient that, even though the hospital has decided that discharge is appropriate, the patient can stay and not be charged for the stay until after the second day following the date of the notice. If the recommendation to merge the two-track system into a single system is adopted, the notice would further state that, should the patient decide to appeal and promptly calls (by noon of the next day) the PRO (whose toll-free number would appear prominently in the notice), the patient could not be discharged or charged for care until the day following the PRO's decision on the case. If a two-track system is retained, the notice just described could be given when the doctor and hospital agree, and a separate, differently worded notice could be given if the hospital has already received review from the PRO. This notice would state that a prompt appeal to the PRO would secure review within three days, with the patient liable for only, at most, one day of care. This is all the beneficiary really needs to know, and further information may be more confusing than helpful. This notice (or notices) should be on forms provided the hospital by HCFA to assure uniformity and accuracy. It should be drafted with ample input from beneficiary organizations to assure that it is comprehensible to beneficiaries.

IX. Utilization Review Denials, Reconsiderations, and Appeals

While PROs do not yet have regulatory authority to deny payment for substandard care, they regularly exercise their authority to deny payment for care they determine to have been rendered unnecessarily, or in an inappropriate setting, or to partially deny requested payment by modifying the DRG assigned by a hospital.[407] When PROs determine that payment should be denied on the basis of lack of necessity, they are required further to determine whether beneficiaries, practitioners, or providers should be excused from liability for the cost of this care because they did

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1989, requires hospitals to assist Medicare patients with discharge planning. 42 U.S.C. § 1395x(ee) (1982 & Supp. IV 1986) (implemented by regulations proposed at 53 Fed. Reg. 22,506 (1988)).

[406] *See* Letter, *supra* note 172, at 4.

[407] 42 U.S.C. § 1320c-3(a) (1982 & Supp. IV 1986); 42 C.F.R. § 412.60(d) (1987); *id.* pt. 466.

not know, and could not reasonably have known, that Medicare would not pay for the care.[408]

The PRO utilization review denial process is normally initiated when a nurse reviewer, applying screening criteria, kicks out an aberrant medical record. This record is then reviewed by a physician (usually not of the specialty of the physician whose work is being reviewed) who then sends a notice to the attending physician and to the provider requesting an explanation.[409] The PRO must allow the physician and provider twenty days to respond to the query and must also allow an opportunity to discuss the problem by telephone.[410] The provider and physician response is then reviewed again, and a final initial determination is made by the PRO. In several of the PROs I interviewed, this determination is made by the initial reviewer; in others it is performed by a second reviewer. In only one of the PROs I interviewed was there an attempt to use a matched specialist for this review.[411] Notice of this initial determination is sent to the beneficiary, physician, provider, and the fiscal intermediary (which denies payment to the provider).[412]

A beneficiary, provider, or physician affected by an initial denial, unfavorable waiver of liability determination, or DRG change may request a reconsideration by the PRO within sixty days of receipt of notice of the denial.[413] The case is then reconsidered by a matched board-certified or board-eligible specialist, who cannot be the person who made the initial determination.[414] If a beneficiary requests a reconsideration, the PRO must complete its review within three working days if the beneficiary is an inpatient in a hospital (and the claim relates to the hospitalization) or if the initial determination was a preadmission review and denied admission, or if the patient is an inpatient in a skilled nursing facility, the PRO must complete its review within ten working days.[415] All other PRO reviews must be completed within thirty working days.[416] Some PROs offer an evidentiary hearing at the reconsideration level; others conduct a review on the written record (considering any additional information offered by the requester) or by telephone.[417]

If the PRO reconsideration decision is unfavorable, and the amount in controversy involves more than $200, the beneficiary may appeal the decision to an ALJ.[418] If more than $2000 is involved, the beneficiary may seek judicial review.[419]

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[408] 42 U.S.C. § 1395pp (1982 & Supp. IV 1986); 42 C.F.R. § 466.86(a)(4) (1987).

[409] 42 C.F.R. § 466.93 (1987).

[410] Third Scope of Work, *supra* note 3, § III(B), at 2–3.

[411] The regulations only require that the determination be made by a physician, 42 C.F.R. § 466.98, though the *PRO Manual* also requires that it be done by a physician who practices in a setting similar to that of the physician whose care is being reviewed. PRO Manual, *supra* note 53, § IM2002. The AMA PRO Executive Survey, *supra* note 136, Table 7, found that 28% of the PROs use specialists for initial medical reviews. More information on this is contained in a recent GAO study. *See generally* GAO Medicare PROs, *supra* note 175.

[412] 42 C.F.R. § 466.94(a) (1987).

[413] 42 U.S.C. § 1320c-4 (1982); 42 C.F.R. §§ 473.15, .16, .20 (1987); PRO Manual, *supra* note 53, § 4082. *See generally* Wilson, *supra* note 400 (on PRO appeals).

[414] 42 C.F.R. § 473.28 (1987); PRO Manual, *supra* note 53, § 4084(A).

[415] 42 C.F.R. § 473.32 (1987).

[416] *Id.*

[417] PRO Manual, *supra* note 53, § 4086(B).

[418] 42 U.S.C. § 1320c-4 (1982).

[419] *Id.*

A provider or physician denied payment, however, has no recourse beyond the reconsideration, except the right to appeal unfavorable waiver of liability determinations.[420] The provider or practitioner may also request an ALJ hearing if the PRO found it to have inappropriately discharged or transferred a patient in circumvention of the PPS system.[421] The physician or provider cannot collect from the patient if payment is denied.

As a practical matter, PRO determinations seldom involve large enough sums of money to justify the cost of an appeal to an ALJ or judicial review.[422] Moreover, since only the beneficiary can directly appeal a PRO necessity or appropriateness decision, and since the beneficiary is usually excused from payment for denied care under the waiver of liability provisions, there is seldom sufficient incentive for the beneficiary to appeal.

PRO officials with whom I spoke generally felt the utilization review system was working rather well. Beneficiary and provider representatives were less sanguine, though few put revising the utilization review process at the top of their PRO agenda. Several concerns, however, were raised by these representatives.

First, providers and practitioners are concerned that they have no means of directly appealing an adverse PRO utilization review decision to an ALJ. 42 U.S.C. section 1320c-4 only allows beneficiaries the right to appeal PRO decisions to an ALJ. As noted above, providers may directly appeal adverse waiver of liability decisions, but not the underlying decision on necessity or appropriateness (except when the provider has been found to have taken an action to circumvent PPS).[423] Even if a provider wins a waiver of liability appeal and the underlying decision is wrong, the provider will be bound by that decision in future cases, for it will not again be able to argue that it did not have notice of the lack of necessity of the service, a necessary element of a waiver of liability determination.[424] Section 9313(a) of OBRA '86 permitted providers and practitioners to represent beneficiaries in Medicare appeals (if they did so without charge and waived any right to payment for the services that were the subject of the appeal),[425] thus effectively allowing providers and practitioners direct appeal rights when the beneficiary agreed to allow such representation. This provision, however, expressly does not apply to PRO decisions.[426] The Senate version of OBRA '87 extended it to the PRO program, but this amendment was dropped from the conference bill,[427] and thus providers and practitioners remain without any means of appealing PRO decisions.

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[420] *Id.* § 1395pp(d) (1982 & Supp. IV 1986). This appeal is only available if the beneficiary does not appeal and if the amount in controversy exceeds $100 for Part A determinations or $500 for Part B determinations. Judicial review is available for waiver of liability determinations involving more than $1000.

[421] PRO Manual, *supra* note 53, § 4088(A); 53 Fed. Reg. 8,665 (1988) (to be codified at 42 C.F.R. § 466.83) (proposed Mar. 16, 1988). This distinction is often not clear. A PRO could find an inappropriate readmission, for example, to be not medically necessary or to be the result of a premature discharge.

[422] Some of course will, such as an admission denial involving a costly medical procedure.

[423] PRO Manual, *supra* note 53, § 4088(A).

[424] 42 U.S.C. § 1395pp(a)(2) (1982).

[425] OBRA '86, Pub. L. No. 99-509, 1986 U.S. Code Cong. & Admin. News (100 Stat.) 1874, 2002 (to be codified at 42 U.S.C. § 1395ff(b)(1)).

[426] 42 U.S.C. § 1395ff(b)(1)(D) (1982 & Supp. IV 1986).

Because few PRO utilization review denials involve large enough sums to justify the cost of an appeal (or even to reach jurisdictional amounts for an appeal), providers and practitioners are much more concerned that utilization review decisions be made correctly in the first place. The data are not encouraging. Nationally as of June 1988 during the second contract cycle, 3.862% of reviewed cases were denied.[428] In over 30% of these cases, a reconsideration was requested.[429] In nearly 44% of these cases, the initial decision was reversed on reconsideration. Reversal rates of individual PROs ranged from 10% to 71%.[430] The SuperPRO has also disagreed with PRO utilization review decisions in a significant proportion of cases.[431] It is difficult to avoid the impression that PROs are often sending out initial denials without adequate consideration, trusting that if the decision is wrong it can always be changed at the reconsideration level. This is not a defensible approach under any circumstance. Considering that denial notices go to beneficiaries as well as to providers and practitioners, and often leave beneficiaries confused, anxious, and uncertain of their own liability for the denied care, this practice is inexcusable.

Two approaches to improving the quality of utilization review decisions are apparent. First, more contact can be required between the PROs and the providers and practitioners whose records they are reviewing. This approach is taken by OBRA '87, which affords a practitioner or provider an opportunity of discussion and review of a proposed denial before the decision is implemented.[432] Although this approach is sensible and is already the practice of many PROs, going further in the direction of requiring the reviewer to justify his or her decision to the practitioner or provider is not without costs. One PRO executive, for example, noted that it is difficult enough to get qualified reviewers, and it will be even more difficult if reviewers are expected to argue face-to-face with other doctors over every review decision.

Second, specialist review can be required at the initial determination level. Currently, final initial decisions are made in most PROs by doctors who are not specialists in the type of medical care under review.[433] Only at the reconsideration level is specialty-matched review required.[434] Given the highly specialized nature of modern medicine, this practice is unacceptable and goes far towards explaining the high level of reconsideration reversals.[435] It may not be practical to assign initial reviews and the drafting of proposed decisions to matched specialists. Indeed, if the review is done on-site, it is probably not possible. But the final initial decision, made after the provider or practitioner has had an opportunity to review and respond to the proposed decision, should be made by a specialist.

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[427] H.R. CONF. REP. No. 495, 100th Cong., 1st Sess. 665, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 2313-1245, 2313 1412.

[428] PRO DATA SUMMARY, *supra* note 403, Table D11.

[429] *Id.*

[430] *Id. See* Whalen, Schmitt, & Rossetti, *Early Experience with Peer Review Organizations*, 3 J. GEN. INTERNAL MED. 59 (Jan.-Feb. 1988) (describing the PRO reconsideration process from a reviewer's perspective).

[431] OIG EFFECTIVENESS REPORT, *supra* note 9, at 12, 61.

[432] OBRA '87, Pub. L. No. 100-203, § 4093, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 1330, 1330-136. *See* 53 Fed. Reg. 8,865 (1988) (to be codified at 42 C.F.R. § 466.93) (proposed Mar. 16, 1988).

[433] *See* 42 C.F.R. § 466.98 (1987).

[434] *See id.* § 473.28; 53 Fed. Reg. 8,666 (1988) (to be codified at 42 C.F.R. § 473.28) (proposed Mar. 16, 1988); PRO MANUAL, *supra* note 53, § 4084.

[435] *See* Whalen, Schmitt, & Rossetti, *supra* note 430, at 61.

A final issue that is beyond the scope of this Article should be noted because it was mentioned so often by the provider representatives that I interviewed. The direct consequence of a PRO utilization review denial is that the fiscal intermediary is notified, which then denies reimbursement to the hospital under Part A for the unnecessary or inappropriate care. The intermediary should notify the carrier, which should deny payment to the physician who ordered the inappropriate care.[436] Hospitals firmly believe, however, that this A-B link has not been made, and carriers are not denying payment to doctors. Hospitals are exceedingly annoyed that they are routinely denied payment for unnecessary care, but the doctors who ordered the care are not penalized by Medicare in any way. Their annoyance seems justified, and taxpayers, who are financing the unnecessary care, should be equally upset.

X. PRO Data Confidentiality and Disclosure

One of the primary functions of the PROs is to assemble data. Not surprisingly, therefore, they possess vast quantities of data on Medicare providers, practitioners, and beneficiaries. PROs are not subject to the requirements of the Freedom of Information Act.[437] Rather, disclosure and maintenance of confidentiality of PRO data are governed by the PRO statute[438] and regulations.[439] The general effect of these provisions is to protect data that identifies patients, providers, and practitioners against disclosure, except insofar as this information is required by federal or state regulatory and law enforcement agencies to carry out their responsibilities.

The PRO confidentiality and disclosure provisions are generally consistent with recommendations made by the Institute of Medicine after a thorough study in 1981.[440] This study thoughtfully weighed the considerations in favor of disclosure and of confidentiality and reached conclusions that continue to be on the whole acceptable. I would favor greater disclosure of health care quality data to assist in creating a smoother functioning market for health care services,[441] but this preference is grounded on health care policy rather than administrative law considerations.[442]

Several confidentiality and disclosure issues have been discussed earlier in this

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[436] Part B Carrier's Manual, § 4169; Gosfield, *Utilization Management and Quality Assurance*, 2 Med. Staff Couns. 15, 16 (Spring 1988).

[437] 42 U.S.C. § 1320c-9(a) (1982 & Supp. IV 1986).

[438] *Id.* § 1320c-9.

[439] 42 C.F.R. pt. 476 (1987); *see also* 53 Fed. Reg. 8,654, 8,666–67 (1988) (to be codified at 42 C.F.R. pt. 476) (proposed Mar. 16, 1988).

[440] *See* Institute of Medicine, Access to Medical Review Data: Disclosure Policy for Professional Standards Review Organizations (1981), *summarized in Searches for A Balance in Medical Data Disclosure: Report of a Study*, 1 Health Aff. 62, 62 (Spring 1982).

[441] *See* Jost, *The Necessary and Proper Role of Regulation to Assure the Quality of Health Care*, 25 Hous. L. Rev. 525, 594–97 (1988).

[442] Greater disclosure is favored also by beneficiary groups. *See* Letter, *supra* note 172, at 5–6; Letter from Sidney Wolfe to HCFA (July 5, 1984) (commenting on proposed PRO confidentiality and disclosure regulations).

Article.[443] There are two additional areas, however, in which PRO policy should be clarified to assist in effectuating the PRO mission. First, PRO sharing of data with state medical boards should be improved. The OIG study on PRO quality assurance activities found that 67% of the PRO CEOs interviewed believed that the relationship between their PRO and state medical board was relatively poor, and 27% felt that greater clarification was needed as to federal restrictions on sharing information with the medical board.[444] This is consistent with my own discussions with the twelve PROs I interviewed, most of whom exchanged little data with the state medical boards.

Section 9353(d) of OBRA '86 requires PROs to share data with state regulatory authorities. Regulations implementing this provision have been proposed by HHS.[445] HHS should promptly promulgate regulations, issue *Manual* provisions implementing these regulations, and amend its *Scope of Work* to require the PROs to formulate a plan for sharing data with state medical boards.[446]

The second issue involves PRO notification of hospitals of problems involving physicians on the staff of those hospitals. The PRO confidentiality regulations require PROs to disclose to an institution, on request, information regarding the practice and performance of practitioners in that institution.[447] Some PROs with which I spoke have interpreted this provision liberally, notifying hospitals immediately whenever they identify quality problems involving physicians on their staffs and fully involving the hospital in the corrective action plan.[448] Others have refused to release any information to hospitals about a practitioner without the consent of that practitioner, which is seldom given. The California Medical Association, recognizing the valuable role that hospital medical staffs can play in assisting physicians with practice problems, has urged HCFA to clarify the responsibilities of PROs to involve hospital medical staffs in resolving physician quality problems.[449] The AMA has debated taking a position favoring disclosure of physician problems to hospital medical staffs, but it stopped short of doing so.[450] The AHA has also asked that hospitals be notified whenever a quality problem is identified by the PRO involving a physician on their medical staffs.[451]

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[443] *See supra* text at notes 278–81, 371–77.

[444] OIG Quality Report, *supra* note 167, at 18; *see also* OIG Licensure & Discipline Report, *supra* note 337, at 15, 17 (faulting the state medical boards for their poor relationship with the PROs). *See also* GAO Medicare PROs, *supra* note 175, at 30 (57% of PROs reported no contact with state medical boards in the fourth year of the program; only 27% reported more than one contact).

[445] 53 Fed. Reg. 8,654, 8,666–67 (1988) (to be codified at 42 C.F.R. pt. 476) (proposed Mar. 16, 1988). HCFA should also alter its proposed regulations to conform to the law. 42 U.S.C. § 1320c-9(b)(2), as amended by OBRA '86, requires disclosure on request to state licensure bodies of data or information "relating to a specific case *or to* a possible pattern of substandard care." The proposed regulation requires disclosure on request of information "relating to a specific case *of* a possible pattern of substandard care." 53 Fed. Reg. 8,654, 8,667 (to be codified at 42 C.F.R. § 476.138(a)(1)) (proposed Mar. 16, 1988) (emphasis added). As the rule would seem to require a pattern of substandard care before information regarding a specific case could be disclosed, it would permit sharing of much less information than the statute. I am informed that this is a misprint, which will be corrected by HHS in the final rule.

[446] *See* OIG Quality Report, *supra* note 167, at iii; current requirements in the *Scope of Work* require this only obliquely (*see* Third Scope of Work, *supra* note 3, §§ XVIII(G), XX, at 41–42).

[447] 42 C.F.R. § 476.133(a)(2) (1987).

[448] *See* AMA PRO Executive Survey, *supra* note 136, Table 15 (85% of the PROs report meeting with medical staff to share corrective action plans).

[449] *See* Letter from Laurens White, CMA, to Thomas Morford, HSQB, at 3 (Mar. 30, 1988).

[450] *PROs Draw Fire from AMA House*, Med. World News, Jan. 12, 1987, at 26.

Several HCFA memos issued in 1988 have further muddied the waters as to the PROs' responsibilities in this respect. A Regional Medical Review Letter issued in January 1988 informed the PROs that absent permission from a physician they could not disclose information concerning quality problems to a hospital medical staff unless the PRO identified a "pattern" of poor practice (involving more than one confirmed problem) and then only if the hospital requested the information. A subsequent Regional Medical Review Letter, dated June 1988, informed PROs that HCFA had reconsidered and that they could inform hospitals of any confirmed quality problems involving physicians on that hospital's staff, with or without a request. This reconsideration was based on the realization that any quality problem involving a physician potentially involved the provider as well. The June 1988 letter, however, prohibited PROs from divulging to hospitals corrective action plans they were considering. This left the PROs in a quandary, as most physician corrective action plans involve hospital oversight. A memo from HSQB, dated July 22, 1988, addresses this situation by permitting PROs to notify hospitals of corrective action plans when the hospital's participation is necessary to implement the plan or if the plan will affect the hospital. Otherwise, notification to the hospital is still prohibited.[452]

HHS should amend its confidentiality regulations to allow PROs to disclose to hospital medical staffs information regarding any confirmed quality problems involving practitioners on the staffs of those hospitals and any corrective action plans involving those practitioners. Hospitals already have a pretty good idea of who on their staff is in trouble with the PROs because they know whose records the PROs are requesting. Explicit sharing of PRO information with the hospitals would help them to better focus their efforts in assisting these problem doctors to improve their practices. Such sharing is certainly consistent with the PRO statute, which permits disclosure of confidential information "to the extent that may be necessary to carry out the purposes of this part" and when the Secretary permits disclosure by regulation.[453] This change would assist PROs in carrying out their quality assurance role, assist hospitals in dealing with problem doctors, and, ultimately, assist doctors in addressing quality problems before beneficiaries are harmed and sanctions become necessary.

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[451] *See* Letter from Jack Owen to William Roper (May 16, 1988) (commenting on proposed PRO regulations). *See also* Remarks of Buetel, Dedic, and Weit on the role of a hospital PRO committee in assisting physicians, Transcript, Conference on Understanding the Federal P.R.O., 95–107 (Feb. 28, 1987) (sponsored by Loyola University Health Law Institute, Chicago Academy of Medicine, and Resurrection Hospital, Chicago).

[452] Memo from Richard Husk, Director Office of Peer Review, to John L. Setman, Associate Regional Administrator, HSQB, Region VII.

[453] 42 U.S.C. § 1320c-9(a)(1)–(2) (1982 & Supp. IV 1986).

XI. CONCLUSION

The PRO program is still very young—a person its age would still be in kindergarten. During its short life it has undergone frequent and dramatic change. Not surprisingly, the beneficiaries, providers, and practitioners affected by the program have frequently found it frustrating and almost always confusing. Among those I interviewed, however, there seemed to be an emerging consensus that the program is worth keeping and that it is maturing. The recommendations delineated in this Article are offered to assist in that maturing process, to fine-tune rather than to radically change the program. They will undoubtedly not be accepted by consensus. The parties affected by the program too often have already staked out positions too sharply at odds to make consensus possible. These suggestions are offered, however, with good will towards the program and to all those affected by it. It is hoped that those with the power to implement these recommendations will consider them carefully as a means towards improving the PRO program to better serve the Medicare program and its beneficiaries.

REPORT TO THE

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

RECOMMENDING THAT

GOVERNMENT CONTRACTING OFFICERS SHOULD MAKE GREATER USE OF ADR TECHNIQUES IN RESOLVING CONTRACT DISPUTES

BY

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GOVERNMENT CONTRACTING OFFICERS SHOULD MAKE GREATER USE OF ADR TECHNIQUES IN RESOLVING CONTRACT DISPUTES

INTRODUCTION

To the reader whose experience in the federal Government contracts disputes process is extensive, the proposition embodied in the title of this report is hardly a shocker.[1] Those familiar with the disputes process authorized by the Contract Disputes Act of 1978[2] (CDA), know that its essence is not so much to provide direction and control from above, but rather to provide a framework within which the contracting parties themselves have the dominant role of determining their rights and duties within a particular contract. The gist of the CDA is that contract disputes first are presented to the Government contracting officer (CO) for resolution and are litigated only if that initial effort fails. The goal of the CDA is to provide an informal and expeditious[3] process for resolving disputes without disrupting contract performance. Practitioners in this specialty generally agree that more cases should be disposed by agreement between the parties by whatever honorable, fair and legitimate means.[4] For

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[1] This report addresses the process of resolving disputes which arise during performance of Government contracts and does not extend specifically to controversies which arise during the contract formation process.

[2] 41 U.S.C. §§ 601-613; 5 U.S.C. § 5108(c)(3); 28 U.S.C. §§ 1346(a)(2), 1491(a)(2), 2401(a), 2414, 2510, 2517; 31 U.S.C. § 1304(a)(3)(C) (1982); enacted November 1, 1978 by Pub. L. No. 95-563, 92 Stat. 2383.

[3] This report does not include an independent study of the fact of or causes of delay in processing contract disputes beyond the contracting officer level. However, the problem of substantial delay in litigating appeals before agency boards of contract appeals is well known by those who observe the process. Report of the Federal Contract Claims and Remedies Committee on Ways of Expediting Appeals Before the Boards of Contract Appeals, 16 Public Contract L.J., 161 (1986).

[4] Both caseloads and litigation time have increased sharply in recent years. For example, the number of docketed appeals at the Armed Services Board of Contract Appeals (ASBCA) increased 200% from 1978 to 1987. ASBCA's Report on Board Procedures During Fiscal 1986. 47 Fed. Cont. Rep. 93-95 (1987). The growth in the number, complexity and cost of litigating these cases is further described in Crowell & Pou, Appealing Government Contract Decisions: Reducing the Cost

[Footnote continued on next page]

the Government, failure to settle may mean litigating small claims whose litigation costs exceed the amount claimed. For the Government contractor, the CDA options that remain when settlement of the issues with the CO fails to materialize -- litigate or forget it -- simply are not satisfactory in many situations. To litigate a contract dispute before an agency board of contract appeals or in the Claims Court is to embark on a resource-costly, time-consuming venture.[5] To give up a claim thought to be valid -- because it has been denied by the CO -- may be a bitter, costly business decision.

If the CDA options for resolution often are unsatisfactory, why then don't the parties caught up in Government contract disputes now make greater use of ADR techniques to settle their differences? The answer to that question is fairly complex. It depends on: (1) a general understanding of the primary Government

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[Footnote continued from previous page]
and Delay of Procurement Litigation, 1987 Recommendations & Reports of the Administrative Conference ___ (1988) (hereinafter Crowell & Pou). The authors state that in recent years,

> . . . hearings on the merits became more formalized and extensive. Caseloads and backlogs increased, disputes became more heavily lawyered, and discovery and motions practice were introduced and expanded. More and more decisions took longer to be reached, and read. Many applauded these trends as enhancing contractors' due process rights; other viewers decried them as inducing delay, bureaucratic irresponsibility, and litigation expenses.
>
> Whatever the merits of these various viewpoints, in 1978 the judicialized model of claims resolution prevailed with the enactment of the Contract Disputes Act ("CDA"), due in large part to a few court decisions finding broad due process rights and agitation by some private bar and board members.

[5] The procedures of the agency boards of contract appeals in particular allow for shortened processes in specific circumstances. For example, decisions on motion for summary judgment, submissions on the record only, and speedier processing of smaller claims. See Arnavas, Donald P., Five Ways to the Merits: Some Suggestions on Seeking Expeditious Resolution of Contract Dispute Litigation, 19 Nat'l Cont. Mgmt. J. 11 (Winter, 1985).

contracts disputes process; (2) an appreciation of the pivotal role of the Government contracting officer and the other principal participants in contract disputes; (3) a familiarity with the various ADR techniques that have potential application to this process; (4) an understanding of the key obstacles that lie in the way of greater ADR use; (5) a recognition of those conditions that are conducive to expanded use of ADR techniques; and finally, (6) an understanding of what specific actions are required to attain the objective of greater CO use of ADR techniques. This paper strives to support the proposition presented by addressing each of these particular considerations.

The central focus of this report is on the Government CO[6] who holds statutory authority to decide disputes that arise under or relate to a Government contract.[7] Implicit in the CO's authority to decide disputes is the authority to resolve disputes by agreement with the claimant.[8] Pursuant to the CDA, the CO decides which Government claims are meritorious and should be presented to the contractor for payment. The CO also finally decides which contractor claims against the Government are compensable and which are not. The finality of the CO's decision to deny a contractor's claims can be overturned only upon successful contractor appeal to the agency board of contract appeals or by successful direct access suit in the Claims Court.[9] The CO has continuing opportunity and authority to settle the disputed matter, extending from the time a contract controversy first arises until the matter is ultimately decided by a board of contract appeals or the Claims Court.[10] In a real sense, the CO presides over the control valve to the whole disputes resolution process. If more disputes are to be settled the CO must be involved. Thus, this CDA process itself will be facilitated by encouraging COs to learn alternate dispute resolution techniques and to use them in appropriate circumstances.

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[6] A detailed description of the role of the contracting officer in the Government procurement process is presented in Bednar & Jones, "The DOD Contracting Officer: A Study of the Past; An Assessment of the Present; Recommendations for the Future", A Report by the Ad Hoc Committee on the Role of DOD Contracting Officers, American Bar Association, Section of Public Contract Law (1987) (hereinafter The DOD Contracting Officer).

[7] 41 U.S.C. § 605(a).

[8] Gene Peters v. United States, 694 F.2d 687 (Fed. Cir. 1982); Cannon Construction Co. v. United States, 162 Ct. Cl. 94, 319 F.2d 173 (1963).

[9] 41 U.S.C. § 605(b).

[10] See Appendix A, Disputes Process, which shows the multiple opportunities for negotiated settlement in the disputes process.

The principal objective of greater CO use of ADR in this context is to provide increased opportunities for fair, relatively inexpensive and relatively expeditious resolution of Government contract disputes by the contracting parties.[11] By recognizing the usefulness of ADR in this decisionmaking process, by encouraging greater ADR application, and by improving the ADR skills of those agency personnel who participate in the CDA process, Government contracting agencies can create a climate in which more disputes are rationally and justly settled without resort to litigation.

What is proposed in this study is not an alternative system to the CDA process, but rather some modest stimuli and incentives to improve the effectiveness of the CDA process itself.[12] What is specifically suggested is expanded use of consensual forms of ADR -- not ADR by regulatory mandate. Agencies as well as COs should be authorized and encouraged, rather than required, to expand the use of ADR methods at the CO level.

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[11] Of course, the agency boards of contract appeals were created for a nearly identical purpose -- to provide informal, expeditious procedures for resolving disputes. See, Statement of Eldon H. Crowell before the U.S. Senate, Committee on the Judiciary, Subcommittee on Courts and Administrative Practice, Hearings on Administrative Dispute Resolution Act of 1988, S.2274, April 29, 1988.

[12] The policy of encouraging agencies and COs to explore the use of ADR in resolving matters between the agency and the contractor before the CO issues a final decision and after the resultant appeal is still in dispute has been supported by the Office of Federal Procurement Policy. Letter to ACUS from Robert P. Bedell, Administrator, OFPP, Dec. 10, 1987.

THE GOVERNMENT CONTRACTS DISPUTES PROCESS

The first major event of the CDA disputes procedure is to direct a particular contractor or Government claim[13] to the contracting officer for a decision. The CO literally controls the sole point of entry to the contract disputes process.[14] The CDA requires that all contract claims be presented in writing to the CO. It also requires that the CO issue a decision in writing and state the reasons for the decision. The CO's decision on contract claims is final and conclusive and is not subject to review by any forum or agency, unless a timely appeal or suit is taken as provided in the CDA. The contractor can litigate final CO decisions in either of two forums -- the appropriate agency board of contract appeals[15] or the Claims Court.[16] Because the CDA greatly broadened the types of claims covered by the process, and specifically includes Government claims against the contractor, the vast majority of Government contract dispute resolution is accomplished in accordance with this CDA procedure.[17]

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[13] A contract claim in this context is a written demand by one of the contracting parties (certified as required by the CDA) seeking as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract FAR § 33.201.

[14] This is not to suggest that the only ADR opportunities in the disputes process are at the CO level. For discussion of ADR opportunities beyond the level of the CO, see Crowell & Pou, Appealing Government Contract Decisions: Reducing The Cost And Delay of Procurement Litigation, 1987 ACUS __ (1987). In addition to the specific ADR techniques discussed in Crowell & Pou, the agency boards of contract appeals under the CDA have procedures intended to truncate the litigation process. The CDA requires these boards to provide for accelerated disposition of claims of $50,000 or less and to establish both expedited disposition and simplified procedures for disputes of $10,000 or less.

[15] Currently, there are 12 federal agency boards of contract appeals, of which the Armed Services Board of Contract Appeals is the oldest and by far the largest.

[16] The option lies with the contractor. For discussion of factors which should be considered in making this binding election, see discussion in Cibinic and Nash, at 947-952.

[17] A discussion of the types of controversies subject to the disputes process established by the CDA is presented in Cibinic and Nash, Administration of Government Contracts, Second Edition, Government Contracts Program, The George

[Footnote continued on next page]

To appreciate the prominent position of the CO in the disputes process, it is helpful to know the nature and sweep of the CO's decisionmaking authority concerning contracts administration. FAR[18] § 2.101 defines a contracting officer as "a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings . . ." The text further explains that a single contracting officer may be responsible for duties in any or all of these areas. However, it is quite common, especially for larger contracting agencies and for major acquisition programs, to divide these basic duties among several contracting officers. For example, one contracting officer may be responsible for awarding contracts and modifications to contracts, another responsible for administering contracts, and a third responsible for settling terminated contracts.[19] Of course, contracting officers have supervisors, such as branch chiefs, office chiefs and heads of contracting activities.

What the quoted definition of a CO suggests but does not make explicit is that this is a powerful Government official, with authority over the contract that is unlike that found in the private sector.[20] For example, contract clauses such as *Changes*,[21] *Inspection*,[22] and *Termination for Convenience*[23] give the CO the unilateral authority to alter significantly the bargain between the parties.

Under the *Changes* clause, the CO may make unilateral changes, in specified contract features, within the general scope of the contract. The contractor must, in order to avoid breaching this material contract provision, continue performance of the work as changed, even if the contractor disagrees with the change. Then,

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[Footnote continued from previous page]
Washington University, 1985 pp. 894-912 (hereinafter Cibinic and Nash).

[18] "FAR" stands for Federal Acquisition Regulation. The FAR was developed pursuant to the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 403(4) and 405(a), and is published in 48 C.F.R. _____.

[19] *The DOD Contracting Officer*, at 26-31.

[20] In remarks at the 1987 Government Contractor Conference on January 29, 1987, Brig. Gen. Norman R. Thorpe, U.S. Air Force reported that the FAR uses the words "the contracting officer shall" a total of 1,879 times.

[21] FAR § 52.243-1.

[22] FAR § 52.246-2.

[23] FAR § 52.249-2.

unless the parties are able to agree on a contract price adjustment resulting from the change, the CO will unilaterally determine the amount, subject to contractor remedies under the Disputes clause.[24]

The Inspection clause grants broad authority to the CO as the Government representative to assure that the contractor accomplishes all inspection and testing necessary to determine that the supplies or services conform to the contract requirements. The clause requires the contractor to provide an inspection system acceptable to the Government. It also authorizes the Government to make inspections and tests while the work is in process. As the Government's representative, the CO may, as authorized by the Inspection clause, reject nonconforming items and services, require correction of defects, and even terminate the contract in circumstances where the contractor fails or refuses to comply. Disputes between the parties as to this inspection process are decided pursuant to the Disputes clause.

The Termination for Convenience clause empowers the CO to terminate contracts for the "convenience of the Government", if the CO determines that a termination is in the Government's interest. The clause gives the Government the broad right to terminate without cause, and to limit the contractor's recovery to incurred costs, profit only on work accomplished, and costs of preparing the termination settlement proposal. There is no recovery for anticipated contract profits.[25] Administration of this clause is also subject to the Disputes clause.

These three clauses -- Changes, Inspection and Termination for Convenience -- are cited merely as examples of the unique authority held by Government COs. This CO authority is unlike that found in the commercial sector.

Administration of these clauses spawns disputes, but these examples are by no means exhaustive of the class. Other examples of typical contract disputes would include cost or pricing issues, specification ambiguities and other contract interpretation controversies. Other contract clauses and other contract administration issues place the CO squarely in the role of decisionmaker for the Government. These Government contract clauses require decisions in the context of the CO acting as the contracting agent of the Government and directly chargeable with protecting the best interests of the United States.

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[24] FAR § 52.233-1. The Supreme Court has recognized that this power to direct changes is an important right in a Government contract. Choteau v. U.S., 95 U.S. 61 (1877). Also see vonBaur, The Origins of the Changes Clause in Naval Procurement, 8 Pub. Cont. L.J. 175 (1976).

[25] The courts have recognized this unilateral power, unparalleled in the commercial section, as an important element of public policy. G.L. Christian and Sons v. U.S., 160 Ct. Cl. 1; 312 F.2d 418 (1963).

In an entirely different context, as mandated by the CDA, the CO is required to make decisions under the Disputes clause of the contract, not as the contracting representative of the United States, per se, but rather in the context of one standing apart from the controversy and acting as an impartial judge.[26] Here lies the opportunity for expanded use of ADR techniques. This vital decisionmaking function should not be constricted by old habits and rote practices. It is in this role of deciding contract disputes that COs should be authorized and encouraged to use whatever disputes resolution technique is best suited for the circumstances. It is in this context that federal contracting agencies[27] are missing opportunities to enjoy the resource savings of litigation avoidance. It is in this context that there exists opportunity for greater use of ADR methods.[28]

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[26] Quite unlike the day-to-day duties of the CO to vigorously protect the interests of the United states under the contract, the CO is required to be unbiased and impartial in deciding the merits of a contractor's claim. In Penn Installation Corp. v. United States, 116 Ct. Cl. 550, 89 F. Supp. 545, aff'd, 340 U.S. 898 (1950), the Court of Claims observed at page 563: "In other words, the contracting officer must act impartially in settling disputes. He must not act as a representative of one of the contracting parties, but also as an impartial, unbiased judge."

The law does not permit the contracting officer to blindly follow the advice of technical advisors. For example, in Shirley Contracting Corp., ASBCA No. 29848, 87-2 BCA ¶ 19,759, the Board found the final CO decision was flawed because the CO accepted an audit report which was obviously inadequate and superficial. More discussion of this legal requirement is presented later in this report.

[27] Alternate dispute resolution techniques have been widely used in the private sector and by state and local jurisdiction. The federal government has been notably slow in picking up on these techniques. Smith, Alternate Means of Dispute Resolution: Practice and Possibilities in the Federal Government, Mo. J. of Dispute Resolution 9 (1984). Also see Dispute Resolution, 88 Yale L. J., 905, 905-1104 (1979).

[28] The U.S. Army Corps of Engineers was the first federal agency to establish an ADR program. ADR Report, June 23, 1988, Vol. 2, p. 219.

THE KEY ROLE OF THE CONTRACTING OFFICER IN RESOLVING DISPUTES

As a body politic, the Government of the United States can act only through its agents. For most functions involving the formation and administration of contracts, that agent is the contracting officer.[29] But, it would be a mistake to conclude that the CO acts alone in the formation and administration of Government contracts. Successful contracts administration in particular depends on daily interaction between Government personnel and contractor employees. Among the key Government participants in this interaction are auditors, inspectors, engineers, production specialists, safety specialists, contracts administrators, and many others whose efforts are essential to efficient contract administration.[30]

With all of this daily dialogue and interaction between representatives of the contracting parties, controversies and disagreements are bound to occur. Most such controversies and disagreements which emerge during this process eventually are settled by agreement between the disputants and do not grow into a formal "claim" by one party against the other.[31] It is common for these contracts administration issues to be amicably resolved without the direct participation of the CO. In fact, the disputes process would collapse of its own burden if all controversies involved the personal attention of the CO. Routine disagreements, often issues of contract interpretation, generally are resolved informally at the level at which they arise. Many of these first-tier controversies involve minor issues of a technical nature and are resolved through discussions between technical personnel on an ad hoc basis. The disputants reach an informal compromise, or one disputant acquiesces in view of the other, or the matter is simply forgotten. It would be rare for disputes resolution techniques more sophisticated than ad hoc negotiation to be helpful in these routine dispositions of controversies.

However, those contract dispute issues that are elevated to the level of the CO present an entirely different opportunity. Disputes rising to this level invoke the CDA process. The CO and team of advisers must address the disputed issues as required by the CDA. It is here that ADR fits naturally into the process, as it is express Government policy to try to resolve these disputes by mutual agreement.[32] Realization of this policy objective depends on three principal factors:

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[29] Shedd, Joel P., Principles on Authority of Contracting Officers in Administration of Government Contracts, 5 Pub. Cont. L.J. 88 (1972). This article provides an excellent discussion of the source and extent of CO authority.

[30] The DOD Contracting Officer, at 41-53.

[31] Cibinic and Nash, at 926.

- The authority of the CO to deal with the particular matter.[33]
- The adequacy of the relevant information brought to the CO's attention.[34]
- The willingness of the parties to reach settlement agreement.[35]

FAR § 33.210 describes the broad settlement authority of the CO in these terms:

> "Except as provided in this section, contracting officers are authorized, within any specific limitations of their warrants, to decide or settle all claims arising under or relating to a contract subject to the Act. This authorization does not extend to --
>
> > (a) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another

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[32] It has long been Government policy to try to reach a negotiated settlement with the contractor before turning to the formal disputes process. Cibinic and Nash, 927. In fact, it is specific Government policy to try to resolve all contract claims by mutual agreement at the CO level, without litigation. Office of Federal Procurement Policy Regulation, 45 Fed. Reg. 31035 (1980); FAR § 33.204.

[33] The authority of the CO is not boundless. For example, the CO has no authority to settle, compromise, pay or adjust any claim involving fraud. FAR § 33.210. For another example, the CO has no authority to settle a tort claim that is not connected with the contract. Cibinic and Nash, at 901-902.

[34] A classic complaint of Government COs is that they are unable to settle the contract dispute because the contractor has not furnished adequate facts to substantiate the claim. Faced with inadequate factual justification, the CO has no alternative other than to deny the claim. Interview with Frank Carr, Chief Trial Attorney, U.S. Army Corps of Engineers, May 9, 1988.

[35] Willingness turns on several factors, including attitude, pressures or lack thereof from others, and finding the time to become involved.

> Federal agency is specifically authorized to administer, settle, or determine; or
>
> (b) The settlement, compromise, payment, or adjustment of any claim involving fraud."

These limitations on the CO's settlement authority derive from the statutory limitations contained in § 6(a) of the CDA. Requests for relief that have been held to be outside the settlement authority because they are "penalties or forfeitures" include disputes concerning Davis-Bacon Act[36] wage classifications and the Contract Work Hours and Safety Standards Act.[37] Where there is evidence of fraud, the CO refers the matter to the agency official responsible for fraud investigation.[38]

If the parties are unable to dispose of a dispute through settlement, the disputes process contemplates the issuance of a contracting officer's "final" decision. A CO's final decision is not appealable by the Government,[39] and the contractor seeking further consideration of the dispute must appeal or file suit within the timeframe and in the manner provided by law.

The courts and the various boards of contract appeals have construed the standard Disputes clause as requiring a contracting officer to make a "personal and independent" judgment on the merits of a contractor's claim or Government claim. This requirement has been held to preclude a CO from agreeing to submit a claim to binding arbitration. In Dames & Moore, IBCA 1308-10-79, 81-2 BCA ¶ 15,418, the Department of Interior Board of Contract Appeals said that an agreement to arbitrate cannot relieve the CO of the duty to make a personal and independent decision on contract disputes, or relieve the Government and the contractor of their duty to resolve disputes in accordance with the Disputes clause. This decision, as well as the position of the Comptroller General, discussed later in this report, have effectively stopped use of binding arbitration as a method for federal contract disputes resolution.

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[36] 40 U.S.C. § 276.

[37] 40 U.S.C. § 327.

[38] FAR § 33.209.

[39] 41 U.S.C. § 605(b). The question may be asked, if the CO is truly impartial and unbiased in rendering a final decision, why shouldn't the Government have the same appeal opportunities as the contractor. As discussed in a later section of this report, the Government final decisionmaking process involves the interested elements of the Agency such that the CO's decision typically represents a consensus position.

Under most circumstances, a contracting officer should and does seek legal and technical advice in arriving at a final decision under the Disputes article.[40] The requirement for independence in the decisionmaking process is satisfied if the final decision is the contracting officer's own by adoption.[41] In fact, the "personal and independent" requirement may be met even though the decision is based principally upon legal advice given the CO by the Government attorneys.[42]

But, a decision by a contracting officer who follows the command direction of a superior without making a personal and independent judgment on the merits of a contractor's claim has been held to be an invalid final decision under the Disputes clause.[43] Instead, such situation may well be determined to be an abdication of CO responsibility.

The contracting officer is required to make an unbiased and impartial determination of the merits of the contractor's claim. Certain agency regulations require contracting officers to refer proposed final decisions to superiors for review.[44] It has been held that a CO's decision submitted to a superior for "approval" nevertheless may constitute a valid final decision.[45]

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[40] FAR § 33.211(a); FAR § 1.602-2(c).

[41] Max Jordan Bauunternehmung, ASBCA No. 23055, 82-1 BCA ¶ 15,685 (1982).

[42] Pacific Architects & Engineers, Inc. v. United States, 203 Ct. Cl. 499, 491 F.2d 734 (1974). Also see Cibinic and Nash, at 941.

[43] See cases discussed in Cibinic and Nash, at 942, 943.

[44] The internal review process does not involve the participation of the contractor. However, the bill which eventually became the CDA included up to the end of the legislation process a provision granting the contractor the right to an informal conference above the level of the CO. The purpose of such informal conference was to encourage settlement of the claim. This feature was stricken from the bill because Admiral Rickover and others thought it would undermine the authority of the contracting officer. 124 Cong. Rec. 36267.

[45] Jacob Schlesinger, Inc. v. U.S., 94 Ct. Cl. 289 (1941); Penner Installation Corp. v. U.S., 116 Ct. Cl. 550, 89 F. Supp. 545, aff'd, 340 U.S. 898 (1950).

A contracting officer's final decision becomes binding on both parties unless a timely appeal is taken.[46] Under the CDA, a final decision becomes "final and conclusive and not subject to review by any forum, tribunal or Government agency" unless appealed to a board within ninety days after receipt of the decision, or to the Claims Court within 12 months following its receipt.[47]

FAR Subpart 33.2, which implements the CDA, establishes additional policy and procedure for deciding Government contract disputes. The Government policy encouraging resolution all contractual issues by mutual agreement at the CO level, without litigation, is clearly expressed in FAR § 33.204. In an apparent gesture to ADR, this section includes the following suggestion:

> In appropriate circumstances, the contracting officer, before issuing a decision on a claim, should consider the use of informal discussions between the parties by individuals who have not participated substantially in the matter in dispute, to aid in resolving the differences.

This suggestion for a "fresh look" at the issues recognizes the potential usefulness of an objective evaluation of the dispute from the perspective of those not directly involved in creating or perpetuating the dispute. This simple suggestion is predicated on the fact that sometimes particular individuals can be involved so deeply in the disputed issues that their positions become nonnegotiable and unchangeable.[48] The FAR suggestion also recognizes that settlement possibilities may be improved by having different representatives of the contracting parties weigh the issues. What is not said is how this process is to flow and how the results of this "fresh look" relate to the ultimate CO decision. While the door is open to a variety of ADR possibilities, in actual practice ADR is rarely even considered.

Beyond this modest, oblique reference to one form of ADR, the FAR provides some specific guidance for application in the CO's contract disputes decisionmaking process. FAR § 33.211 requires the CO to:

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[46] In U.S. v. Holpuch, 328 U.S. 234 (1946), the court held that a contractor's claim was "outlawed" because the contractor did not appeal to the board within the time prescribed in the Disputes clause.

[47] 41 U.S.C. § 609(a).

[48] One of the reasons that cases may be settled even after getting into the grips of the litigators is that the litigators provide a new and detached assessment of the case.

- review the facts pertinent to the claim;
- secure assistance from legal and other advisers;
- coordinate with the contract administration officer and others as appropriate; and
- prepare a written decision.

The issuance of a final decision and the filing of an appeal by the contractor does not end the contracting officer's authority to settle the claim.[49] If a contracting officer enters into settlement negotiations after issuing a final decision but before the time for appeal has expired, the decision can lose its "finality."[50]

In fact, the CO retains settlement authority even during litigation at the board of contract appeals.[51] For example, settlement agreements reached after a decision by the Board but prior to the expiration of time for a motion for reconsideration have been held to constitute an accord and satisfaction binding both parties.[52]

However, the CO's authority to settle claims does not extend to cases where litigation has commenced in a court, because federal law grants the Attorney General sole authority to settle cases being litigated in the courts.[53] Nevertheless, the CO can and usually does strongly influence the outcome by assuring the CO's position is known and understood.

The rather "bare bones" FAR guidance to COs results in considerable variety in the specific way agency contracting officers actually decide contract disputes. The following are examples of the variations amongst agencies:

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[49] See chart at Appendix A.

[50] Cibinic and Nash, at 929.

[51] The CO has authority to settle until the rights are vested. American Bosch Arma Corp., ASBCA No. 10305, 67-2 BCA ¶ 6564 (1967).

[52] Cibinic and Nash, at 930.

[53] 28 U.S.C. §§ 516 & 519; Executive Order No. 6166; United States v. Newport News Shipbuilding & Dry Dock Co., 571 F.2d 1283 (4th Cir.), cert. denied, 439 U.S. 875 (1978).

- The CO makes the final decision after drawing in advice and information from others as necessary.[54]

- The CO is required to coordinate or confer with a superior agency official or committee for approval before issuing a final decision.[55]

- The CO is required to obtain the review and comments of the Chief Trial Attorney before issuing a final decision.[56]

- The CO is the nominal and apparent author of the final decision, but in fact the actual decisionmaker is someone else in the agency.[57]

- The CO is a member of the decisionmaking board or committee.[58]

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[54] This is the situation within the Environmental Protection Agency. COs are required to have final decisions reviewed by legal counsel and the Chief, Contracting Office, prior to its issuance. 48 C.F.R. § 1533.211. Many other Government agencies follow this same procedure.

[55] The procedure in the Naval Facilities Engineering Command is to control authority to issue final decisions at a high level. In contractor claims less than $250,000, the final decision is issued by the Engineering Field Division; over $250,000 by the Naval Facilities Engineering Command. In both situations the policy is to try to settle the dispute before it rises to the level of a final CO decision. Naval Facilities Engineering Command Contracting Manual (NAVFAC p. 68) (Oct. 1987).

[56] This is the situation for the U.S. Air Force. AF FAR Supp. 33.211(a)(2). The Chief Trial Attorney leads the office to which are assigned the attorneys who represent the Air Force in disputes before the Armed Services Board of Contract Appeals.

[57] This has been observed personally by the author in his experience with the disputes process. For example, where the dispute turns on a technical issue beyond the full understanding of the CO, the CO is likely to adopt the determination of a technical advisor.

[58] This formal structure for advice would draw into conference all those advisors having special knowledge or experience related to the issues in dispute. The CO may or may not be

[Footnote continued on next page]

What actual practice shows is that CO disputes resolution is very much a shared activity, with other Government persons participating in the process. In all situations the CO acts in concert with others and the difference is only in the extent of the structure and the formality of the process. Accordingly, for ADR to flourish, the active support of all who share in the disputes resolution process is important.

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the chairperson, but would come away with a decision developed during the meeting of the board or committee.

CO RELATIONSHIPS WITH OTHER GOVERNMENT PARTICIPANTS

Only in rare instances would the CO act alone in deciding a Government contract dispute.[59] Depending on the nature of the problem, specialists in pricing, auditing, production, packaging, maintenance, quality control, transportation, contract administration, contract law and various fields of engineering are available from within the agency or within the Government.[60] In most contract dispute situations several Government advisers participate directly or indirectly. Perhaps the most common participants are attorneys, auditors, engineers and program managers.[61] The CO interacts with these professional and technical specialists to obtain advice, information and direction. Each of these participants in the disputes process, and others not mentioned as examples, has a strong influence on the disposition of issues.[62] They are positioned to encourage or discourage wider use of ADR techniques.

1. Attorneys.

The CO is required by FAR §§ 1.602-2(c) and 33.211(a)(2) to obtain legal advice in the process of developing a decision on a contract dispute. Government attorneys who provide that advice ordinarily are knowledgeable and experienced in Government contract law and disputes procedure. Most attorneys are assigned to legal offices reporting directly to senior agency management.[63] In this organizational structure, neither the CO nor the attorney is the superior or subordinate of the other. The Government attorney is not a CO and has no independent authority to bind the Government in contract.[64] Nevertheless, because of the attorney's professional stature and lofty position within the agency organization, the attorney has significant influence over CO decisions. In some situations, the legal adviser to the CO may also be the attorney to represent the agency before a board of contract appeals if the contractor appeals an adverse final decision. In practice, the CO tends to be deferential to the advice of the attorney and acts contrary to that advice only in unusual circumstances.

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[59] In most dispute situations it would be very poor judgment for the CO to act without first gaining legal and technical advice. Barringer & Botke, IBCA No. 428-3-64, 65-1 BCA ¶ 4797 (1965).

[60] See Briefing Paper No. 86-4 (Reidl & Bastianelli) "Contracting Officer Authority", Federal Publications, Inc., March, 1986.

[61] For a fuller discussion of these relationships with the CO see The DOD Contracting Officer, at 41-53.

[62] An experienced Government attorney wrote, "Often, the dispute is between the contractor and the Government engineer, inspector, auditor, or disbursing officer. I have seen numerous cases in which the CO sided with the contractor against these Government officials." Letter to the author from James F. Nagle, Attorney, Contract Law Division, Department of the Army, March 28, 1988.

[63] The DoD Contracting Officer, at 46.

Thus, Government attorneys could stimulate and influence expanded use of ADR in settling contract disputes.[65] With some exceptions, this has not been the prevailing condition. The reasons why most Government attorneys have not been more forceful in promoting ADR are not objectively demonstrable. There are some likely reasons. All attorneys tend to be conservative in doing their work and stick to conventional approaches to solving problems. Government attorneys are particularly familiar with the CDA process and are comfortable in working within that traditional method of disputes resolution. Many are unfamiliar with ADR and would be uncomfortable recommending ADR use. On the other hand, the job of providing legal advice to the CO could extend to suggesting that a particular case was appropriate for ADR. While it is for Government managers rather than their lawyers to give official concern to conserving agency time and money resources and to seek more efficient ways to do the agency's work, Government lawyers do have a strong interest in efficient legal methods. Many Government attorneys surely have felt the frustrations of the CDA disputes process and could be strong advocates of ADR once convinced of its benefits to the process.[66] Significant acceptance of ADR may come once more Government attorneys recognize that these techniques often provide a more efficient method of disposing of claims than does litigation.

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[64] Defoe Shipbuilding Co., ASBCA No. 17095, 74-1 BCA ¶ 10,537 (1974).

[65] Interview of Lester Edelman, Chief Counsel, U.S. Army Corps of Engineers, April 8, 1988. The Corps of Engineers has settled several contract disputes pursuant to ADR techniques, and is recognized as the lead federal agency in this regard. As attorneys have strong influence within the organization, it is important to train them in ADR techniques.

[66] Marquerite Millhauser, in her essay "The Unspoken Resistance to Alternate Dispute Resolution," Negotiation Journal, January 1987, suggests that, because of self-doubts or skepticism, a lawyer's first reaction to a proposal to use ADR is likely to be aggressive opposition. But with calm persistence by the side first proposing ADR, the lawyer on the other side may be more willing to accept the proposal on its face and embrace it as his or her own.

2. Auditors.

COs also tend to be deferential to the conclusions of Government auditors. By regulation, if an agency CO disagrees with the auditor's conclusions in an audit of a contractor's pricing proposal, the CO is required to explain the basis for the disagreement in writing.[67] Most COs are strongly impelled by practice as well as by regulation to accede to the conclusions of the auditor. An auditor's advice ordinarily is rejected only after deliberate review of the auditor's advice.[68]

As auditors deal with precise numbers, it is arguable that auditors are by nature opposed to compromise settlement of disputes. On the other hand, few contract disputes turn exclusively on facts and figures which are objectively determinable. For example, while it may be objectively determinable how much expense a contractor has incurred on a given contractual requirement, the real issue in dispute may be how much of that cost incurrence was reasonable. For another example, it may easily be shown the amount of money originally bid on a job, when the disputed issue may be whether the job was underbid. Both of these examples provide room for judgment and compromise. In deciding a dispute, the CO would use the auditor's information but also would use judgment. In short, there is no reason inherent in the nature of their work for auditors to be opposed to wider use of ADR.[69] Auditors may be expected to raise a strong voice favoring a well-reasoned, auditable, written ADR settlement agreement reached through ADR methods.[70] Having gained that assurance, auditors reasonably may be expected to join in support of expanded ADR use.

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[67] FAR § 15.803(c).

[68] The DOD Contracting Officer, at 47; DOD Directive 7640.2.

[69] Interview with Michael J. Thibault and David Capitano, Defense Contract Audit Agency, May 13, 1988.

[70] The Corps of Engineers used a minitrial to resolve a dispute on the Tennessee-Tom Bigbee waterway project. The contractor's claim of $60 million was settled for $17.25 million. The DOD Inspector General investigated the settlement. The Inspector General found no fault with the use of a minitrial or with the settlement, but did criticize the adequacy of the supporting documentation for arriving at the amount due. Sourcebook, 581-586.

3. Engineers.

COs are rarely prepared by education or experience to deal comfortably with the technical aspects of a dispute. When technical issues are present the CO looks to Government engineers for technical advice. Government engineers prepare contract specifications, evaluate contractor technical proposals and assist COs directly in evaluating claims. Engineers frequently are appointed as CO technical representatives for contract administration. Sometimes engineers have direct knowledge of the facts giving rise to the dispute. Sometimes the engineers have authored the specification about which the parties are in controversy. Thus, engineers play an important and sometimes decisive role in disputes resolution.[71]

Engineers tend to have strong views as to the technical correctness of a contract claim, but they also tend to be practical minded. Engineers may thus be expected to support wider use of ADR in disputes resolution, if they believe that ADR provides an efficient forum for full consideration of the technical aspects of the disputed matter.

4. Program Managers.[72]

Most Government program managers are found in DOD. A program manager has the responsibility for acquiring and fielding a major system. Thus, the program manager has centralized management authority over all technical and business aspects of major systems acquisition. In this sense, the program manager controls the funds, and speaks for the agency element which generated the requirement for the contract and is awaiting the completion of contract performance. While having overall authority and responsibility for the acquisition of a system, program managers generally do not have authority to enter contracts. Contractual arrangements are the province of the CO. The organizational relationships between the program manager and the CO tends to fall into one of four categories:

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[71] The DOD Contracting Officer, at 44. In disputes involving technical issues, the CO would look to the Government's technical experts to evaluate the facts and circumstances and to develop a position. That position ordinarily is adopted by the CO. Sometimes, during the course of negotiations with the contractor's representatives, the CO will be persuaded to use the contractor's technical position and will, in effect, overrule the Government's technical position.

[72] Much has been written about the relationship of the CO and the Program Manager. The Packard Commission report A Quest for Excellence, June 1986, includes the recommendation: "Establishing short, unambiguous lines of authority would streamline the acquisition process and cut through bureaucratic red tape. By this means, the DoD should substantially reduce the number of acquisition personnel."

In the report, The DoD Contracting Officer, it is recommended that program managers and COs train together.

- The CO works in the contracts department, but provides direct support to the program manager on a full or part-time basis.
- The CO works in the program office, but reports to and is supervised by the contracts department.
- The CO both works in and is supervised by the program manager.
- The program manager is appointed as a CO.[73]

Whatever the organizational relationship, there is a close tie between the CO and the program manager which is reflected also in their approach to disputes resolution. Very broadly speaking, the program manager drives to meet the program needs of the agency, while leaving the contract-related problems in the hands of the CO.[74] As the focus of the program manager is on timely acquisition and fielding of the system, contract disputes become matters of concern to the program manager in direct relationship to their potential program impact. If the dispute disrupts or does not materially impact the program, the typical program manager would tend to defer to others on how best to bring the matter to resolution. On the other hand, if the contract disputes or looms as a threat to the program, the program manager will be a key actor in seeking a prompt and satisfactory resolution.[75]

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[73] One reason why the Corps of Engineers has found success in using ADR methods in resolving contract disputes is that the commander (District Engineer) is appointed as a CO for the ADR process.

[74] A discussion of this relationship is presented in Higginbotham, Richard W., Program Manager and Contracting Officer: What are Their Roles?, Contract Management, April 1987, at 12.

[75] In dealing with disputes arising out of contracts which are not under a program manager, the CO will contend with an agency official representing the ultimate user of the goods or services being required. The "user" also provides the funds for the acquisition and, accordingly, is another team person to deal with in the disputes resolution process.

Accordingly, there are no irreconcilable differences between the roles and interests of those who participate most directly in the disputes process and the expanded use of ADR. Disputes resolution should be viewed as a team effort, with a number of essential participants in direct support of the CO. Strengthening this team work through increased use of ADR techniques is consistent with best management practices and catches the spirit of the much respected Packard Commission Report for greater efficiency in procurement.[76] Wider ADR use in contract disputes resolution is dependent in large part on gaining the enthusiastic support of those Government advisers and officials who hold major roles in the contracting process as well as in the more narrow disputes resolution process. This is a tough challenge, but a challenge that can be met with time, patience and persistence. Some modest suggestions for gaining agency support of greater ADR use in resolving contract disputes at the CO level are presented in a later section.[77]

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[76] See Kavanaugh, Jack & Michelle Kalkowski, The Packard Commission: A Blueprint for Change, Contract Management, April, 1986, at 14.

[77] Participation of these advisors to the CO in the CDA process provides a sort of multiple check and balance. This term approach tends to protect the public interest that important decision be rationally made. For this additional reason, it is important that these same team members have a role in ADR methods. This has been the experience of the Corps of Engineers and the Navy in their successful use of ADR in resolving Government contract disputes.

KEY FORMS OF ADR SUITABLE FOR CONTRACT DISPUTES

The law is clear that actual authority is required to bind the Government in contract.[78] The CO is the Government official authorized to execute contractual documents which bind the United States.[79] Similarly, only the CO holds authority to decide disputes arising under or relating to such contracts. Thus, there are serious practical and legal implications in pursuing any ADR approach which purports to work outside the CO's authority. Properly structured, however, there are a number of ADR techniques which are consistent with the CO authority, which may even have the effect of strengthening that authority, and which are perfectly suitable for resolving Government contract disputes.

1. Negotiation.

Because ad hoc negotiations between the parties to the contract dispute already is a familiar technique under CDA procedures, one does not readily reflect on it as a form of ADR. However, negotiation is a key ADR method, and one which should be developed for greater use at the CO level. Skilled in negotiation techniques, COs could do much better in their bargaining, whether with contractors or informally with agency personnel. Many COs doubtless already see themselves as experienced and competent negotiators. However, experience has shown that increased training and attention to listening and communication skills, use of "interest" and "principled" rather than "positional" bargaining, and similar negotiation approaches can significantly improve many persons' abilities. Present CO training does not specifically address these skills, and thus presents a gap in their skills and self-image as professionals.[80]

As developed earlier, the CO also holds a key role as "team builder" of those who participate in the disputes resolution process. ADR, including in particular improved negotiation skills, can better enable a CO to facilitate meaningful discussion with a contractor by first working to develop a coherent intra-agency position that takes into account the views and needs of attorneys, auditors, program managers, engineers and others.

In this way, even without the assistance of a third-party neutral, the CO can help avert appeals by reducing the number of situations where it is easier simply to pass the buck to the board of contract appeals because of internal disagreements or incoherent positions.

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[78] Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947).

[79] FAR § 2.101.

[80] For discussion of key self perceptions of DoD contracting officers, *see*, *The DoD Contracting Officer*, at 82.

2. Arbitration.[81]

The essence of arbitration is that a neutral third party selected by the disputing parties decides the issues submitted after receiving evidence and argument from the parties. The neutral commonly is selected because of subject-matter expertise. Arbitration may be binding on the parties by operation of law or through contractual agreement. Non-binding arbitration also is practiced to a more limited extent. Arbitration also may be either voluntary or mandatory, depending on the basis of the structure. Arbitration is widely used in resolving disputes between Government prime contractors and subcontractors.[82] It is also widely used in the commercial sector, especially in labor-management disputes.[83] Arbitration may be structured to permit a compromise solution.

In the Government contracts context, as in many others, the Comptroller General has held that the Government cannot be bound by arbitration unless the agency has specific statutory authorization, or the arbitrator is limited to fact finding.[84].

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[81] An excellent discussion of arbitration in the Government contracts context is presented in Crowell & Pou, 54-57. Also see Elkouri, Frank & Edna A. Elkouri, How Arbitration Works, D.C.: BNA, 1960.

[82] Subcontractors generally do not have the right to take contract claims directly with the Government because of the lack of privity. FAR § 44.203(b)(3).

[83] Hardy, Timothy S. and R. Mason Cargill, Resolving Government Contract Disputes: Why Not Arbitrate?. 34 Fed. B. J., 20 (1975).

[84] The Administrative Conference and others have called for Congress to overturn this view. Administrative Conference 86-3, 1 C.F.R. § 305.86-3; Harter, 1986 Recommendations and Reports of the Administrative Conference of the U.S. (hereinafter 1986 ACUS); ADR Sourcebook, p. 309 (1987); Hardy & Cargill, Resolving Government Contracts Disputes: Why Not Arbitrate?, 34 Fed. B. J. 1 (1975), ADR Sourcebook 351; Behre, Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?, 16 Pub. Cont. L. J. 66 (1986). A recent report to the Administrative Conference by Richard K. Berg, Legal and Structural Obstacles to the Use of Alternative

[Footnote continued on next page]

Because of the CDA process and the position of the Comptroller General, arbitration is not one of the favored ADR techniques presently used to resolve disputes between the Government and its contracting partners.[85] Should the legal cloud cast by the Comptroller General be removed, such as by legislation, the way would be clear to consider arbitration more fully as a potential ADR technique.

Given the CO's CDA decisionmaking authority, arbitration could be a viable consideration in at least two contexts: one, in a non-binding scenario where the neutral arbitrator's decision would be advisory only to the CO; two, in a scenario designating a particularly recognized and respected Government official as the CO and "arbitrator." By agreeing to making a CO the arbitrator -- that is, a CO who theretofore was not involved in the disputed issues -- the contracting parties would, in effect, facilitate the CO's decisionmaking responsibility under the CDA through a structured arbitration. An immediate concern is whether a contractor would agree to arbitration in circumstances where a Government official was designated as a contracting officer and arbitrator. The answer of course depends on the facts and circumstances. However, holding in mind that the CDA now requires the contracting officer to be unbiased and impartial in making a final decision under the Disputes clause, and that the CO's decision is often made on the basis of facts informally developed, there may very well be situations where the parties would agree to making the CO the arbitrator. Unlike the current process for reaching a final decision, where no procedure is prescribed for presenting facts and argument to the CO, traditional arbitration procedure at least would lend itself to a more disciplined presentation of facts and arguments to the CO in the role of arbitrator. In this context, placing a CO in the role of arbitrator would not be remarkably different from the CO's current CDA role as a neutral, final decisionmaker. In fact, the arbitration process would better equip the CO to render a better informed decision.

[Footnote continued from previous page]
Dispute Resolution in Federal Programs, (September 1987), argues persuasively that GAO's objections are without legal foundation and unpersuasive.

[85] There are exceptions to this general rule. In his unpublished paper "Alternative Dispute Resolution Methods for Government Contracting" June, 1988, Frank Carr reports on the successful use of non-binding arbitration in several separate cases involving Corps of Engineers contracts.

3. Factfinding.

The central idea of this ADR method is to locate and designate an individual or panel with special qualifications in the subject matter of the dispute, who then develops the facts and presents them in a report to the contracting parties.[86] The parties then may negotiate a settlement, embark on another ADR path, or place the matter back onto the CDA track. Considering that most Government contract disputes are heavily fact-driven, and that highly technical issues often separate the parties, factfinding has strong potential application to the Government contract's disputes resolution process.

Consider for example a dispute focusing on the issue of whether certain sophisticated electronics work did or did not conform to the technical specification of the contract. Using the technique of factfinding, the CO and the contractor might be able to accelerate dispute resolution by gaining the informed, factual analysis and advice of a recognized, neutral, electronics expert.

4. Minitrial.

To the limited extent that ADR so far has been used in the resolution of Government contract disputes, the minitrial has been the preferred approach.[87] The Corps of Engineers, the Navy, NASA and others have used the minitrial with well-publicized success.[88] In essence, the minitrial is a structured settlement process based on densely concentrated presentations of facts and arguments to senior officials for each side authorized to settle the dispute.[89] The minitrial occurs before a final CO decision. In most Government contracts minitrials to date, a neutral adviser has participated to provide opinions and advice and to otherwise facilitate resolution of the issues. The idea of the minitrial is that the principals for each side will come to agreement after having heard the presentations of fact and argument within the catalytic presence of the neutral adviser. The CO or the CO Supervisor who also is a CO could very well be the principal for the Government in a minitrial structured to resolve a Government contract dispute. Such direct CO participation is seen as being in harmony with the CDA. If the minitrial produces agreement, the dispute is resolved. If the minitrial fails to produce agreement, the matter would be ripe for final decision and follow-on CDA litigation.

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[86] Paths to Justice: Major Public Policy Issues of Dispute Resolution, Report of the Ad Hoc Panel on Dispute Resolution and Public Policy, National Institute for Dispute Resolution (Oct. 1983), ADR Sourcebook, at 45.

[87] Crowell & Pou, at 19.

[88] Edelman, Lester & Frank Carr, The Mini-Trial: An Alternative Dispute Resolution Procedure, 42 Arb. J. 7 (1987) ADR Sourcebook, 231.

[89] Nash, A New Technique for Settling Disputes--The Minitrial (1985) (unpublished article); Killian, Paul & David Mancini, Mini-Trails: Basic Principles & Guidelines, Construction Briefings, Fed. Pub. (March 1985).

5. Mediation.

This technique simply involves the assistance of a neutral third party in negotiating an agreement between the contracting parties themselves.[90] It is less formal and less structured than the minitrial. The mediator has no authority beyond that bestowed by the parties and is not asked to render a decision. The CO could represent the Government at mediation without prejudice to the CDA responsibilities. Mediation is seen as a step above ad hoc negotiations, as it recognizes the potential for an earlier and better settlement by drawing upon the knowledge and experience of a trusted neutral. The mediator's role can be as active as the parties themselves permit,[91] thus keeping the parties in control of the process. The mediator can be a source of fresh approaches to problem resolution, a sounding board for settlement ideas, and an impartial adviser.[92] The skills of a mediator can produce agreement even in circumstances where the positions of the negotiators seem to be immutably hardened.[93]

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[90] Folberg, Jay & Alison Taylor, Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation. San Francisco: Jossey-Bass (1984).

[91] A strong mediator can play a role similar to a settlement judge by proposing settlement terms and urging the parties to accept them. Letter to ACUS from Peter H. Kaskell, Senior Vice President, Center for Public Resources, Nov. 17, 1987.

[92] Having an experienced, mediator is key. Having a mediator knowledgeable in the subject matter of the dispute is a distinct advantage. Interview of Judge Edward Houry, Department of Agriculture Board of Contract Appeals, by Mr. Wallace Warfield, ACUS, March 2, 1988.

[93] *See* discussion in Crowell & Pou, at 49-51.

6. Settlement Judges

This ADR technique contemplates the use of a special "settlement" judge to encourage the parties to resolve the dispute without compromising the position of the parties in subsequent litigations should settlement not be attained. The settlement judge ordinarily is not the trial judge later in those situations where settlement does not materialize. Hence, this process is readily distinguishable from the routine practice of many trial judges to encourage the parties during pretrial to narrow the issues or settle the dispute.

The CO's role in this particular ADR process is subject to considerable variation. The use of a settlement judge could prompt the CO to undertake a relook of the disputed issues even after having made a final decision denying the contractor's claim. The perceived advantage of this approach is the opportunity to gain authoritative advice as to how the case might be decided in the settlement judge's court or board of contract appeals. The apparent shortcoming of this ADR method is that the settlement judge's advice necessarily would be based on something less than that information which would emerge during actual litigation. Furthermore, a settlement judge is aware of the forum's caseload and could be influenced by that knowledge. Nevertheless, the way should be cleared for COs to seek assistance from a settlement judge in suitable circumstances.

7. Disputes Resolution Boards[94]

Recently, the Corps of Engineers began using a new ADR method that the Corps refers to as a "dispute resolution panel." Although this method is new to the federal sector, it has been used by several state governments in large construction projects performed in the western states. Under this ADR method, the parties agree that contract disputes arising during construction may be voluntarily submitted to the panel for an opinion as soon as the disputes occur.

Under the Corps of Engineers program, a disputes resolution panel consists of three private technical experts. The government and the contractor each select one member of the panel and the third is selected by agreement of those two members. The procedure provides for disputes to be submitted to the panel as disputes inevitably emerge during actual construction. The panel makes a nonbinding written recommendation to the contracting officer and the contractor.

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[94] This description of the Disputes Resolution Board is based on an unpublished paper by Frank Carr, titled "Alternate Dispute Resolution Methods for Government Contracting", June, 1988.

Unlike most ADR methods which address disputes reactively, the dispute resolution board attempts to resolve a dispute at its inception, before the Government and the contractor have begun to expend resources in support of the litigation. Further, easy accessibility to the panel and the prompt resolution of disputes should cause a minimum of disruption of the construction work and maintain an amicable working relationship between the parties.

At this writing, two Corps of Engineers Districts are in the process of implementing this ADR method by including a disputes resolution board provision in several contracts. So far, however, this ADR technique is not known to have been used in Government construction contracting.

8. Summary Trial With Binding Decision

This is a procedure pursuant to which the scheduling of the appeal is expedited and the disputants try their appeal informally before an Administrative Judge or panel of judges. A summary, "bench" decision generally will be issued upon conclusion of the trial; or a summary written decision will be issued no later than ten days following its conclusion. The parties must agree that decisions, rulings, and orders by the Board under this method, against the Government or Appellant, shall be final, conclusive, not appealable, and may not be set aside, except for fraud. All such decisions, rulings and orders will have no precedential value. The length of trial and the extent to which scheduling of the appeal is expedited will be tailored to the needs of each particular case. Pre-trial, trial, and post-trial procedures and rules applicable to appeals generally will be modified or eliminated to expedite resolution of the appeal.

Because of the public interest involved, it is important in all settlement methods that the Government side has before it sufficient factual information on which to base a rational decision. In this regard, it should be understood that dispute resolution through use of an alternate technique would nevertheless require that the contractor provide sufficient facts to the Government and to certify in the submission of those facts for claims over $50,000 that: "the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable." This certification, presently required by the CDA for claims over $50,000[95] should continue to be required in the ADR context.

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[95] 41 U.S.C. § 605(c)(1). The essential value of such certificate is to place liability on the contractor for misstatements or false claims. The CDA gives the Government additional protection against false claims by entitling it to recover the amount of the unsupported part of the claim, plus the costs of reviewing that part of the claim which states an overcharge. 41 U.S.C. § 604.

KEY OBSTACLES TO GREATER ADR USE

A convincing case can be made for the proposition that agreement between the parties directly involved is the best way to resolve disputes which arise during the performance of Government contracts. The parties to the dispute are best positioned to know the facts. They even may have participated in creation of the issues which remain in dispute. They are best positioned to know the program and other business implications of settlement -- certainly better positioned than would be a board or court. They often are strongly motivated to compose their differences and get on with the work which is the subject of the contract. By prompt settlement of the issues there is a real opportunity to better control the outcome and to save both time and litigation costs.

If those obvious virtues of early settlement of disputes by the contracting parties involved directly are valid, it then follows that the parties to the dispute ought to be encouraged and motivated to settle rather than to litigate, and ought to be facilitated in the disputes resolution process through appropriate use of a variety of techniques and procedures. Particularly at the level of the contracting officer, there should be expanded use of dispute resolution techniques like those previously discussed in this report.

The term "at the level of the contracting officer" is meant at the level of the contracting officer having authority to make final decisions within the meaning of the Contract Disputes Act. Said another way, the CO who is given responsibility for disputes resolution is not necessarily the CO who awarded the contract or is principally responsible for its administration. The term also should be understood to encompass a relatively wide band of time, not precisely delimited, including at the front end of the process settlement of contract administration issues which have not ripened into formal claims, and extending in time to include continuing opportunities to settle cases that have moved to the hands of the litigators after the CO's final decision. In short, ADR has a legitimate place in the decisionmaking process at any time the CO has authority to settle the contract dispute.

Given the proposition that ADR techniques could foster settlement of more disputes, it becomes important to identify and consider those key obstacles standing in the way. The following are seen as the key impediments:

1. Unawareness.

Notwithstanding the recent welling of attention to ADR in the Government contracts context, Government agencies traditionally have relied on negotiations by COs or litigation before agency boards of contract appeals to resolve contract disputes. This has been the primary path to resolution of contract disputes. There remains widespread lack of enlightenment and misunderstanding of what other ADR techniques are and how they might fit into the contract disputes resolution process. ADR simply is not well known by those responsible for contracts disputes resolution -- by either the contractor or by the Government.

The principal reason for this incognizance seems to be agency inertia. Contract disputes resolution follows a familiar path, the path specifically authorized by statute, pointed to by regulations, described in a contract clause and routinized in practice. Contract disputes resolution was simply not regarded as fertile ground for ADR techniques until the relatively recent use of minitrials by the Corps of Engineers and occasional ADR experiments in a small number of other agencies. As ADR has not been employed extensively in the contracts disputes process, there is no broad exposure to its qualities and applications. Thus, this lack of awareness remains a serious obstacle. Much work needs to be done by proponents of ADR to teach what these techniques are and to warm up the potential participants to the idea of ADR. As more Government contracts cases are successfully settled through an ADR approach, the good news of ADR gradually will spread and the obstacle of unawareness will be abated.

2. Apprehensiveness.

There seems to be no end to the fears associated with first use of ADR.[96] Among the most commonly misgivings mentioned in the literature and by persons interviewed are (a) fear that the contractor will agree to ADR for the real purpose of learning more about the Government's case -- or vice versa; (b) nervousness by the contracting officer that the ADR result will be criticized by the agency's inspector general or by the Congress; (c) skittishness that the "boss" will disagree with the settlement result; (d) concern that the private bar somehow will manipulate ADR practice to its advantage and to the disadvantage of the disputants; (e) misgiving that ADR somehow will carve into the contracting officer's turf or authority; and (f) concern that ADR will expose weaknesses in the case. There are other fears, but these few are most frequently mentioned. The obstacle of apprehensiveness, like that of ignorance, will be overcome as ADR success breeds additional success. There is no rational basis for any of these fears. If the ADR process produces agreement, it is an agreement achieved by persons of authority who are well positioned to know all the facts and implications of the settlement; certainly they are better positioned than a court or board. If the ADR process results in failure to agree, at least the parties will have learned more about the strengths and weaknesses of their own case as well as that of their contracting partner. Surely, even a "failed" ADR experience will help expedite the preparation for any litigation which follows. In this sense, the "risk" of pursuing ADR is minimum.

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[96] Fear, particularly fear of being criticized by others such as DCAA, may well be the major obstacle to wider use of ADR techniques at the CO level. Letter to the author from Jeffrey B. Trattner, Director of Purchasing, The Perkin-Elmer Corporation, August 4, 1988.

3. Concern That ADR May Not Save Time Or Money.

Some suggest a reluctance to try ADR techniques because they are not convinced that time or money actually will be saved.[97] ADR, it is asserted, may turn out to be a sidetrack from the straighter, more familiar path to resolution by litigation. It is true that there are no precise gauges by which it may be objectively demonstrated how much time or money that ADR will save. On the other hand, to the extent that settlement of the dispute by the parties generally is a quicker process than litigation, this is a baseless concern.[98] In the context used in this report, ADR serves to strengthen and extend the techniques already available to the contracting officer for settlement. Given the time-consuming steps involved in litigation, settlement of the issues between the parties through use of ADR techniques at least warrants thoughtful consideration in most cases. Adding the real cost of the litigation risk itself to the comparison of ADR with litigation would further tip the balance toward ADR as the less costly alternative.

4. Short-Term Schedule Problems.

This objection declares that ADR should be dismissed from consideration simply because busy executives cannot spare the time required to participate directly in the ADR process. In a sense, some forms of ADR does ask busy executives to take on work that in the traditional manner of contracts disputes resolution could be passed on to litigators. Accordingly, there is a misperception that litigation is less disruptive to managers than ADR.

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[97] It is important to hold in mind that the Government rarely decides to settle a case simply because it would be expensive to litigate the case. There are two key reasons for this. First, the Government may not spend funds unless it is authorized to do so. Second, in the public interest, citizens must know that they cannot obtain Government money simply by filing suit. Statement of Stuart E. Schiffer, Department of Justice, before the Senate Administrative Law and Government Relations Subcommittee, Committee on the Judiciary, June 16, 1988.

[98] Use of ADR in circumstances other than Government contract disputes has resulted in substantial dollar savings over litigation. "ADR Is For Real", BNA's ADR Report, Vol. 2, No. 19, Sept. 1988, at 318.

The answer to this concern is that the busy executives should welcome an opportunity to deal with and dispose of a matter early through ADR. ADR means early addressal of the disputed issues. Litigation on the other hand promises to drain precious, corporate and government resources for weeks, months or even years to come. Bad news does not improve with age. The more important the dispute, the more important it is for the busy executive to become involved early in the process.

The total time and energy required to take on a tough problem is likely to be less when concentrated soon after the events, as opposed to continued but less concentrated addressal over a longer time period. Settlement through ADR suggests prompt and concentrated effort; litigation preparation and execution tends to be largely a start-stop effort over a protracted period, with periodic interruptions of the executive, culminating in many situations with a surge effort at the end. In short, whether settled by ADR or litigated, a significant contract dispute will put time demands upon the executive.

5. ADR May Hide Mistakes From Public Scrutiny.

It is a legitimate concern that important Government decisions be shown under the bright light of public scrutiny. Under the CDA process this is attained through published decisions of boards and courts. Settlement agreements, however, are not published. Some argue that settlement of contract disputes are essentially secret agreements, hidden from public view and thus sheltered from public accountability. Unlike court or board decisions which are published, settlement agreements, so the argument goes, may be used to conceal mistakes and bad judgment. Others suggest that settling a case makes it easier for the Government to give away too much in the interest of expediency. These concerns can present a substantial obstacle to greater use of ADR techniques in support of contract dispute settlement.

The removal of this obstacle lies in the detail which may be required to be included in the written ADR settlement agreement, and in what happens to the agreement after it is reached. The predicate for public accountability may be established by requiring that the basis and justification for the settlement agreement be expressed with reasons in written format. Whatever the ADR technique, it is important to prepare a memorandum reflecting that the settlement result is contractually rational as well as fair and reasonable. The memorandum should take the reader from the initial position of each contesting participant through the negotiating or bargaining process and ultimately to the final agreement. In doing this, it is important that the memorandum show clearly the reasoning process for arriving at the settlement result. The memorandum could then provide written evidence that the result is rational, fair and reasonable. The evidence must be detailed enough to reflect the most significant considerations which shape the settlement agreement, without burdening the ADR process with detail or minutia.

The fulfillment of public accountability may be met by assuring that the settlement agreement is subject to Government audit. Essentially, there is no ultimate difference between a settlement agreement reached through the ADR process and a settlement agreement reached through traditional CO decision under the CDA or settlement of quantum issues following litigation of the entitlement issues. In all these situations, the ultimate measure of the rightness of the result is the competency and integrity of the participants.

6. The Facts Are Too Complex.

A critical element of the contract disputes process is knowing the facts. The argument which holds up this obstacle to ADR asserts that it takes a board or court to thoroughly sort out the complex tangle of facts which often characterize a Government contract dispute. The thought is that ADR necessarily would provide a more shallow or too hasty addressal of the facts and thus be more likely to lead to a wrong result than that produced by a court or board. Just the opposite should be true.

While a judge unquestionably will know the law, a judge with no technical experience in the disputed matters is far less qualified to deal with the technical issues than are the principals to an ADR procedure who have been specially selected for their particular knowledge or ability. In other circumstances, the ADR principals literally may have lived with the issues as they were emerging. Experience with minitrials has demonstrated that even principals with thin preknowledge of the case can quickly absorb the facts essential for a rational decision. Another important ADR attribute is that no information need be excluded from the decisionmakers on procedural grounds, as is true in formal litigation. ADR methods facilitate the marshalling and presenting of the facts to the decisionmakers. In short, factual complexity of the dispute is an argument favoring ADR rather than favoring litigation.

7. The Law Is Too Complex.

There are at least a couple of aspects to this objection to greater use of ADR. One aspect is that, particularly in view of the recent rush of new Government contract laws and regulations, the legal guideposts may be too complicated or undefined to support a settlement of the issues. Hence, so goes the argument, only the courts and boards should determine what the law is. The other aspect of this objection is that settlement is inappropriate in those circumstances where legal issues are present as opposed to factual issues only. The first aspect of this concern presents the argument that only courts or boards should establish legal precedent. The second aspect presents the notion that legal questions themselves are inappropriate for resolution through use of ADR.

The approach to removal of this obstacle is to clarify that what is proposed in this report is nothing more than the application of additional, more effective techniques to the settlement process which already exists. Government contract controversies are settled every day. The CDA, which is the key source of procedural law, has been part of the scene for roughly 10 years. Most of the CDA is stable law. ADR merely adds sensible refinement to the settlement process already authorized by the CDA and practiced in a more limited way every day. As to the proposition that legal precedent is to be made exclusively by the boards and the courts, there is no disagreement in this paper.[99] That, of course, means that not all contract disputes are appropriate for settlement. If no legal precedent exists, one or both of the parties may not be comfortable with settlement. Gaining the precedent of a board or court decision may be important and ADR would not be pursued in these circumstances.

On the other hand, as to the argument that ADR techniques are inappropriate for deciding legal issues, the answer is that legal issues routinely are decided by lay persons, with or without legal advice, every day in the ordinary course of Government contracts administration. If this were not true, the very process of contracts administration would come to a standstill while legal issues such as "latent" defect, "acceptance" of the goods or services, "allowable" cost and "final" payment were referred for judicial decision. Lay persons can and do decide these legal issues every day. Moreover, settling a contract dispute by means of ADR does not mean the settlement is accomplished without benefit of legal advice. The principal representatives of the parties to a contract dispute do seek legal advice on legal issues. There is every reason why this practice should continue under ADR. In short, the fact that legal issues are involved in the dispute does not disqualify the case for use of ADR techniques.

In sum, there is a clear, rational path to overcome each of these commonly perceived obstacles to wider use of ADR. ADR is not here proposed as a panacea to all the frustrations which attend the CDA disputes process. What is proposed is a logical extension of existing settlement practice by employment of techniques which are demonstrably effective and which are gaining favor in many other sectors.

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[99] That precedent, of course, can be modified or superceded by legislative action.

CONDITIONS FOSTERING SUCCESSFUL USE OF ADR

Just as certain preexisting conditions tend to promote successful formation of a Government contract, there are certain conditions which tend to promote the chances of ADR success in Government contract disputes resolution. As is true with every consensual undertaking, the disposition of the participants and the climate in which they interact strongly influence the eventual outcome. Parties to a Government contract dispute will be motivated to pursue a particular course of action aimed at dispute resolution if they believe that that particular course of action is legitimately available and has a reasonable chance of success. The parties would not set out deliberately to fail. Other factors, of course, bear on selection of a course of action. Time and cost are two of these. But the critical element is the belief that success is reasonably within reach. These, then, are some of the conditions which tend to foster rather than to smother chances for ADR success.

1. Authority.

The disputes resolution process should be direct and dispositive. The representatives of the Government and of the contractor should have unmistakable authority to reach a binding settlement of the disputed issues. They should not be mere spokespersons for the real decisionmakers. Disputes resolution discussions between persons with authority only to provide advice or recommendations are likely to be seen as an unpromising diversion from the straighter path to actual disposition by a court or agency board of contract appeals.

The problem with designating persons lacking settlement authority to conduct or participate in the ADR proceedings is that the results cannot be dispository. At best, such settlement approach results in an affirmative recommendation for acceptance and approval of a tentative settlement reached by the respective authorized participants. At worst, it is a fruitless exercise with no agreement by anybody. Government contracting officers in particular tend to staunchly guard their personal authority to make "final" decisions in the disputes process. They would tend to see an ADR proceeding conducted exclusively by others as either an unhelpful exercise or as a threat to their own authority.

In some ADR circumstances, of course, there would be an important role for third-party advisers. In a mini-trial, for example, the participation of a qualified neutral adviser can make the difference between settlement and failure. Similarly, the facts attending the dispute may well make it appropriate for each side to gain personal, technical advice during the ADR proceeding.[100]

In the ADR process, then, an official empowered to bind the Government should represent the Government. This means either the contracting officer responsible for the contract out of which the dispute arose or an official especially appointed to settle the dispute. Similarly, the contractor should be represented by someone with authority to bind the contractor. Authority is seen as an important element fostering success in ADR.

2. Motivation And Commitment.

The chances of success in using ADR techniques are substantially improved if the principal representative for each side believes that ADR holds a real promise of dispute resolution and is worth pursuing.[101] This condition is particularly difficult to develop in circumstances where the participants have not had earlier, positive experience with ADR. Because ADR techniques generally are not well understood within the Government contracts community, there is a natural reluctance to give ADR a try. If the disputants don't know about ADR, or believe ADR is not much more than an interesting experiment, or think it is a side track to the more promising path to dispute resolution, then the ADR approach is doomed to fail. There must be sincere motivation to become involved in the ADR approach and to see it through to conclusion.

The motivation to try an ADR approach can be developed. The strongest proponents of ADR use in contract disputes are those who actually have employed its techniques in contract dispute resolution. This speaks well for the future of ADR in this milieu, for as greater use of ADR catches on the chorus of supportive voices will multiply. Meanwhile, it will remain important for those who have practiced or studied the application of ADR to Government contracts dispute resolution to continue to explain its virtues and to advocate its use.

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[100] But in all these situations, it remains essential that the principal representative of each side have actual authority to dispose of the dispute.

[101] In this regard, the earlier in the controversy the better. As observed by the Army's Litigation Chief in a letter to ACUS dated November 16, 1987, it is difficult to get the parties to agree to ADR after the contractor has rejected less formal procedures by filing suit in the Claims Court.

3. Approval.

Conditions must be such that the principal representative of each side feels comfortable that their respective superiors approve of the use of ADR techniques. This a separate concern from that of authority. Both the contractor and Government participants must be certain that ADR is more than an authorized path to dispute resolution; it must also be recognized as an acceptable process. The participants seek assurance that they will not be criticized for its use. ADR simply cannot work if the principal representatives are unsure of their authority or are strongly concerned that their pursuit of dispute resolution through ADR is not "okay". In this regard, there is no federal statute or executive order or Government-wide regulation which specifically sanctions and encourages the use of ADR in Government contract dispute resolution.[102]

In the absence of such statutory and regulatory underpinning, the parties to a contract dispute are likely to lack confidence that ADR is "alright", and therefore lack the confidence to try it. As a pure legal matter, enabling legislation is unnecessary for the practice of ADR (other than, perhaps, binding arbitration) in the context discussed in this paper. Nevertheless, as is discussed more fully in another section of this report, a supporting statute is desirable to place ADR at the same level of approval as the primary disputes process prescribed by the CDA. This is not to recommend a check list approach to ADR; rather it is to suggest authorization and encouragement. An executive order implemented by affirmative language in FAR Part 33, "Protests, Disputes, and Appeals" also is important to establish a sufficient condition of approval and encouragement of broader use of ADR techniques to resolve Government contract disputes.

4. ADR Skill.

Another condition that tends to promote successful use of ADR is basic training or experience in the skills of ADR techniques. Principal representatives familiar with the mechanics and art of ADR are better equipped than is the novice to embark on a particular ADR technique and to move steadily and confidently to dispute resolution. Skills such as conflict management and negotiation techniques put the parties in a more favorable position to take on ADR. Of course, every ADR approach to dispute resolution is a unique experience, necessarily shaped and formed by the facts, the law and the total make-up of the participants in the particular dispute. It is important for the parties to be flexible. Rigid protocols are inimical to ADR success. It would be a mistake to develop a stylized routine to be followed in all situations. Nevertheless, just as there are certain fundamental advocacy skills which tend to make one a better advocate, there are certain ADR techniques to be learned which tend to make one better in the ADR arena. Training in ADR techniques should teach these fundamentals in case settings drawn from real situations. At the same time, ADR training should emphasize the imperative of flexibility.

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[102] This thought is developed in a letter from Gary L. Hopkins, Associate Counsel, E-Systems, to the author, July 22, 1988.

5. Maneuver Room.

Contract disputes are unlikely to settle unless there is a reasonable range within which each party is willing to come to terms. If either party is convinced it has a clear winner, ADR is unlikely to work. From an objective viewpoint, plainly meritorious claims should be paid; conversely, claims clearly without merit should not be paid and will not gain in dignity simply because they are addressed pursuant to ADR techniques. Both parties must believe that the correct result is somewhere in the middle of a given range of possibilities. ADR works best in an arena where claimants with reasonable positions and a willingness to make reasonable compromise are present.

6. Economy.

Another important condition which tends to foster use of ADR techniques is that the ADR alternative be less costly than litigation in either an administrative or judicial forum. This is not to suggest that the ultimate compensation paid pursuant to ADR must be either greater or lesser than what might be won or lost in court. The point here is that the actual cost of the ADR dispute resolution process itself is less expensive than the primary forms of litigation before a court or appeals board. This is a very important factor, for as things are now, all a contracting officer need do is make a "final" decision denying the claim, thus leaving the litigation effort for others. To the CO, this can be a cheap if irresponsible disposition. Managers must be made familiar with ADR methods, as managers are required by their positions to care about the costs of contract disputes resolution in terms of resources. For the contracting officer to be willing to find the time and make the effort to employ ADR, the contracting officer must know that the ADR route in fact will be less costly in time and effort than would the full route of litigation. If ADR is merely an added step in the process, or if it is perceived as just as costly and onerous as litigation, the contracting officer will not participate. As those who have had actual ADR experience are convinced of its relative cost advantage, the condition of economy should not be difficult to demonstrate for parties otherwise willing to try ADR.

7. Contractual Basis For Settlement.

Another important condition is that the subject matter in dispute be resolvable under the Contract Disputes Act of 1978 (CDA). Broadly speaking, that means the claims for relief must arise under or relate to a Government contract. Additionally, the dispute must be one within the subject matter settlement authority of the contracting officer under the CDA. This would exclude from the ADR process, for examples, claims not arising under or related to contract, claims involving fraud and claims involving statutory penalties or forfeitures under the jurisdiction of another particular federal agency. The essential theme of this report is to suggest expanded use of ADR techniques in the course of CDA disputes resolution by Government contracting officers; not to suggest a widening of the sorts of disputes appropriate for settlement by contracting officers.

8. Settled Government Policy.

ADR techniques normally would not provide a proper method for establishing Government procurement policy. The task to be accomplished is the resolution of a contract dispute, not the establishment of new public procurement policy. Those policy matters should be left to the traditional agency mechanisms. This is not to suggest that ADR is appropriate only in circumstances where the law of the case is clearly settled. That is not the condition which exists today in many circumstances where a contracting officer settles a contract dispute with the contractor. Many contract disputes are a tangled mixture of fact and law not surgically separable. Contracting officer decisions do not typically differentiate between law and fact.[103] Nevertheless, contracting officers are empowered to settle such cases. Adding ADR techniques to the settlement process should not detract from the existing authority of contracting officers.

9. Rules Of Engagement.

The parties to the contract dispute should agree in advance on the framework within which the ADR procedure will be conducted.

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[103] In other circumstances, contracting officers make legal decisions directly, such as determining that a given condition is a "latent" defect.

This agreement is best reduced to writing and signed by the principal representative of each party.[104] While the primary rule should be flexibility, a number of procedural and administrative issues should be settled in advance in order to facilitate the entire process. Among those considerations would be the identification of the participants, written expression of the issues to be resolved, the date, time and place of the ADR sessions, the sequence of events and the manner of payment of the ADR costs. In some cases it also may be necessary to reach agreement on the extent to which information disclosed during the ADR procedures may be used in future related and unrelated proceedings.

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[104] An excellent sample agreement concerning procedures for mini-trial appears as an attachment to Turnquist, "ADR initiations at the Department of the Navy", Continuing Legal Costs: ADR Strategies for Corporations, Law Firms, and Government, Edited by: Erika S. Fine, Butterworth Legal Publishers, 1988 at 305.

COs CAN BE MOVED TO RESOLVE MORE DISPUTES WITHOUT RESORT TO LITIGATION

Generally speaking, the typical CO will make strong efforts at resolving the disputed issues before making the final decision turning the parties to litigation.[105] COs have an enviable record of resolving most disputes that come before them. In some situations the attempt at settlement will be through exchange of correspondence; in other less common situations, the CO and other Government representatives will meet with the contractor representatives for face-to-face discussions. These are the traditional approaches. Rarely does a CO consider alternative approaches to dispute resolution. The fundamental reason for this mindset, of course, is that traditionally ADR has not been used. Before the CDA, the primary disputes process was prescribed by regulation and implemented by a contract clause. There was no mention of ADR in the regulations or in the contract clauses which prescribed the administrative disputes process. Now that there is a statutory basis for contract disputes resolution, the CDA, there still is no statutory or regulatory language directly authorizing or approving ADR techniques for the CO. As a practical matter, it simply is too much to expect for most contracting officers regularly to initiate an alternate approach to disputes resolution when no law or regulation covering disputes even directly mentions the subject.[106]

Those agencies which have experimented in any significant way with ADR have done so mainly because of the strong influence of a high-ranking individual within the agency who has formed an interest in the subject.[107]

One way to correct this situation and to encourage expanded consideration is through legislation. The Administrative Conference has recommended that Congress encourage appropriate use of ADR and to make agency disputes resolutions practice simpler and more productive. A broad-based bill introduced in the 100th Congress by Senator Grassley would confirm agencies' authority to employ these methods and encourage them to make use of it. S. 2274, the Administrative Dispute Resolution Act of 1988, would go far to shape a positive government policy encouraging informed public sector use of ADR -- much as the U.S. Arbitration Act of 1925 did for arbitration in many private sector disputes. Congressman Pease has introduced a companion House ADR bill, H.R. 5101, that is similar. Even though the bulk of agency comments were quite positive, the bills failed to become law during the 100th Congress.

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[105] Behre, Arbitration: A Permissible or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts? (1988), ADR Sourcebook, at 371.

[106] For ADR to take hold in the contract disputes resolution process it needs to be "institutionalized." Letter to ACUS from Peter H. Kaskell, Senior Vice President, Center for Public Resources, November 17, 1987.

[107] For example, the acknowledged leader of the Government contracts ADR effort in the Corps of Engineers is the Chief Counsel, Lester Edleman.

The main procedural thrust of S. 2274 and H.R. 5101 would be to foster the use of flexible alternatives by allowing the contracting parties to shape procedures to fit the circumstances on a case by case basis. Although the Grassley proposal would potentially apply to all kinds of disputes relating to agency administrative programs, it is based wholly on the principle of consent -- every process addressed in the bill would be invoked only with the knowing agreement of the parties, including the Government.

The federal Government is in an ideal position to serve as a model for the rest of our society in this particular regard. Given the CDA policy encouraging settlement, Government contracting agencies should be in the forefront in using consensual dispute resolution. Instead, almost all are lagging far behind the remainder of our country's state, local and private sector dispute processors. More than one knowledgeable observer has noted that while top echelon officials at DOJ sing the praises of ADR, all too many litigators cling tenaciously to the motions and discovery practice with which they are comfortable and disdain the less adversarial approaches.[108] This duality should be ended; ADR should cease being "one of those subjects that receives almost universal endorsement in theory but substantially less in practice."[109] This attitude should be replaced, with government managers, COs, attorneys, program officials and others viewing alternative means of dispute resolution as a major set of tools that can be routinely considered and aptly used.

The impetus for meaningful change will have to come from the top levels of government -- Congress and top executive officials. Otherwise, those who participate in contract disputes resolution may prefer the safety of the status quo to thoughtful consideration of more suitable alternatives. Congress should send a clear signal that "ADR is okay", and that informed, rational use of it will be supported. S. 2274 is an important first step along this path.

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[108] E.g., Richard Mays, ADR & Environmental Enforcement: A Noble Experiment or a Lost Cause?, 18 Envtl. L. Rptr. 10087, 10091 (1988); remarks of Eldon Crowell at Administrative Conference Colloquium on Improving Dispute Resolution, transcript (June 1, 1987).

[109] Marguerite Millhauser, The Unspoken Resistance to ADR, Negotiation J. 29 (Jan. 1987).

As directly related to the subject of this report, Section 3 of the Bill calls on agencies to consider potential ADR uses and to develop a dispute resolution policy, to appoint a dispute resolution specialist, and to ensure personnel training in negotiation and dispute resolution methods. These provisions are intended as a start to carrying out both the Act's policy favoring ADR and its findings that greater use of ADR will improve the operation of the government.

The proposed legislation also amends the Administrative Procedure Act to authorize the parties specifically to agree to use mediation, simplified or expedited procedures, or other mutually agreeable processes to resolve disputes arising under federal administrative programs. (Section 4). Although the use of most ADR is not necessarily inconsistent with existing requirements, this feature will resolve any doubt about the compatibility of ADR with current requirements. Arbitration is included subject to general guidelines on issues likely to be apt or inapt for ADR (Section 4).

Section 5 of the Bill amends the Contract Disputes Act to encourage agency COs and BCAs to use consensual methods to settle acquisition disputes; it specifically authorizes use of ADR in contract disputes, subject to Section 4's guidelines. These changes will greatly extend the flexibility of COs, boards of contract appeals, and contractors to use minitrials and other appropriate means to better handle contract claims. The Act also takes steps to make it easier for agencies to use ADR. It authorizes them, for instance, to accept volunteer services from mediators or other "neutrals" and to hire them promptly and efficiently. These steps will encourage other agencies to follow the initiatives of the Army Corps of Engineers, the Department of the Navy, and the Claims Court in an area where litigation has increased almost exponentially in recent years.

Of course, there are factors other than the absence of a specific ADR statute which inhibit the CO's use of alternate approaches. These were discussed earlier in this report and include prominently the specter of being second-guessed or criticized. There also will remain even with an ADR statute the comfort of following the CDA process knowing that somebody else has to litigate if the claimant simply is turned down. There also is the press on the CO of other business, which leaves little time for settling contract claims. Most significant, however, is the fact that the primary method of disputes resolution is clearly laid out in the statute, the FAR and the contract Disputes clause, while ADR is not even mentioned as a possibility. Unless ADR has a statutory foundation compatible with the CDA, many COs are unlikely to give ADR techniques serious consideration in the contract disputes process. What this strongly suggests is that ADR can never flower in the patch of contract disputes until it is planted firmly by statute or at least by some other strong expression of federal policy such as an executive order.

This perceived need for an authorizing statute is not to suggest that there presently exists a fundamental legal impediment to using ADR techniques. With the single possible exception of binding arbitration, it does not appear from review of the literature and from interviews of experts that there is a statutory impediment in the CDA to CO use of ADR techniques to resolve Government contract disputes. While legislation may not be needed to provide a technical legal undergirding, it could provide a clear, unambiguous policy signal that ADR techniques plainly are authorized and approved. COs and others need this assurance. Until this uncertainly that ADR is alright is removed by legislation or executive order, and agencies then encourage COs to employ ADR techniques in settling disputes, use of ADR in this context is likely to remain at the experimental level. Additionally, as has been recommended by the Administrative Conference,[110] Congress should specifically authorize the use of arbitration in contract disputes at the agency's discretion.

More than Congressional and Presidential anointment of ADR will be necessary to realize a significant increase in alternate techniques for disputes resolution. The full potential of ADR cannot be attained without a cultural change within most contracting agencies. A clear federal ADR policy and rational implementing regulations may dissolve agency and CO concern over authority for and approval of ADR techniques, but will not have the immediate effect of establishing confidence in alternate methods or of igniting excitement in their use. There are several practical reasons for this. First, it will remain the principal business of COs to award new contracts. This concentration on contract awards, which cannot be put off, makes disputes resolution, which often can be put off, a secondary matter. Traditionally, the job performance of COs is evaluated principally on their success in contract formation -- often rated on the basis of contracts awarded or dollars obligated by contract -- and for less on their achievements in contract dispute resolution. This condition is hardly conducive to the trying of more imaginative approaches to dispute resolution. This suggests that COs must be specifically motivated to use ADR before there can be a dramatic increase in its use.

Effective use of ADR means coming to grips firmly with the dispute and reaching a dispositive solution. This is a different process than "deciding" a dispute by turning down a claimant and forcing litigation. Thus, even with a statute, the COs must be further encouraged to try ADR, trained[111] in ADR techniques and rewarded for appropriate use of them.

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[110] Administrative Conference Recommendation 87-5, Assuring the Fairness and Acceptability of Federal Agency Arbitration, 1 C.F.R. § 305.87-5.

Some COs too will continue to have the problem of finding the time to pursue ADR personally.

What this all means is that with or without a statute providing a firm undergirding, it will take time for the CDA mindset to be tempered with the advantages presented by ADR, and time to train those involved in the dispute resolution process. While ADR training readily can be developed and presented, the cultural wariness of ADR will take longer to abate. To mold genuine, enthusiastic support for ADR techniques will require specific and sustained efforts on many fronts. Both broad categories of participants in the contract disputes process must be stimulated to reflect upon the possibilities of ADR in each particular dispute -- Government personnel and contractor personnel. Within each of these groupings, the key participants tend to mirror each other in job assignment and orientation. These key figures are executive officials responsible for the contracting process, program and project managers, attorneys, accountants, engineers and other technical personnel, and, finally, contracting officials. The flow of encouragement should be from top-down. Some specific incentives would include:

1. Stronger federal policy statements -- arrived at through the FAR process, so as to gain specifically the participation of Government contractors and the public -- which would encourage COs, before final decision, to explore the use of ADR to resolve the dispute.

2. More comprehensive programs of promoting ADR, such as that recently established by the Corps of Engineers, to apply ADR techniques in specific test cases, to conduct training programs and to provide notices and guidance for personnel and contractors.[112]

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[111] The Federal Acquisition Institute (FAI) can be a valuable resource in identifying the managerial and operational population for whom ADR training is key, and in structuring the content of the training programs. Interview of Jack Livingston, Director of FAI, Office of Federal Procurement Policy, April 29, 1988.

[112] The Corps of Engineers Program is described in 2 ADR Report 365 (1988).

3. Agencies, and perhaps large Government contractors,[113] should designate an official within the acquisition hierarchy as the ADR Specialist, with the specific mission of developing more effective contract disputes resolution practices, to include encouraging wider use of ADR methods in the contract dispute process.[114]

4. Government contracts should include a clause specifically describing the full range of ADR techniques available for consideration by the parties at the time a claim is presented to the CO for resolution under the CDA.[115]

5. COs involved in the disputes process should be specifically evaluated as part of the annual performance evaluation cycle on their effectiveness in managing contract disputes, to include the use of alternate techniques in disposing of such disputes during the rated period.

6. BCA judges should be specifically alert for suggesting return to the CO level of cases which evidently should be pursued more vigorously for settlement.[116]

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[113] It was reported in The National Law Journal that most corporations that seriously pursue ADR designate a "point person" who is responsible for conceiving, coordinating and implementing the program throughout the corporation. (Oct. 3, 1988 at 17)

[114] The ADR Specialist could be a senior acquisition executive within the agency. The mission of this position would include challenging barriers to wider ADR use and promoting ADR use through outreach programs with industry and Government. The ADR Specialist has potential to achieve substantially improved understanding of and use of ADR procedures at the CO level. The ADR Specialist would operate much as the agency "Competition Advocate" operates to foster greater competition in contracting pursuant to the Office of Federal Procurement Policy Act, 41 U.S.C. § 404.

[115] The best time to first open the issue of ADR is in the drafting of the contract. Reichardt, David L., "Auditing Litigation -- The Ultimate Finesse," Contract Management, pp. 8-9, July 1986.

[116] A number of agency boards of contract appeals, to include NASA, Navy, Agriculture and Transportation have developed or are developing DR rules which could be amended to encourage remand to COs in appropriate cases.

7. ADR training programs[117] for both industry and Government personnel will be necessary, as well. In this regard, ADR training should not be offered as a "stand alone" subject, as though it had some life of its own. Rather, ADR training should be integrated into existing training programs on techniques to improve the contract formation and contract administration processes itself, so as to abate conditions which later lead to disputes. ADR training also fits naturally into training on broader disputes resolution procedures under CDA.

In the long run, however, ADR will catch on only to the extent that its actual practice produces convincing measurable results. When the parties to a contract dispute come to recognize that ADR holds greater promise than does litigation for a just, relatively expeditious and relatively less costly solution, ADR will become a more popular option in suitable cases.

There also is the obvious requirement for contractor participation in ADR. Will it be difficult to gain the cooperation of Government contractors in expanded use of ADR techniques? The key is whether contractors can be persuaded as to the practical advantages of ADR in given circumstances.[118] Government contractors are accustomed to conforming with federal policy and practices, to include Government procedural requirements. Furthermore, the terms of most Government contracts today are set by the Government. Pursuant to both the Changes clause and the Disputes clause the contractor today does not have the option of walking off the job and challenging the Government's position through litigation. The Government contract requires that the contractor continue performance under the contract, leaving until later the determination of the issue of which party will bear the costs.[119] If contractors can foresee earlier and less costly claims recovery through ADR, then ADR will be supported.

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[117] An attachment to the report includes examples of ADR training components for COs, recently developed by Wallace Warfield, Visiting Fellow, ACUS.

[118] On the other hand, contractors may be unwilling to agree to ADR in circumstances where they have a strong case or where they fear "losing face" with the customer by being unwilling to compromise. Letter from Robert Eastburn, Jr., Chief Counsel, Forth Worth Division, General Dynamics, to the author, June 30, 1988.

[119] Contractors may be expected to be more willing to agree to ADR when it is a contractor claim and the Government holds the money. Department of Defense Inspector General Memorandum for Assistant Inspector General (Analysis and Followup), subject "Review of Contract Audit Reports in Litigation", April 1, 1988.

Contractors tend to be frustrated with the burdens and bureaucracy which attend litigation. To the extent that ADR holds real promise of fairly resolving the issues in dispute short of expensive litigation, the Government contractor should be willing to participate.[120]

Other factors also should motivate contractors to participate in greater use of ADR. Highly important is that many ADR techniques keep the outcome within the control of the contracting parties instead of surrendering the outcome to the board or court. Settlement also speeds the process of determining which party bears the costs of the contested contract issues, tends to preserve a cooperative, business relationship between the parties, avoids the adversarial nature of litigation,[121] and fosters the early return to concentrating on the real purpose of the contract, namely productive contract work. Once ADR is specifically sanctioned and encouraged as a preferred choice over litigation, willing contractor participation will be forthcoming.[122]

CONCLUSION

The promise of a quick and inexpensive contract disputes resolution process that was embodied in the CDA has been frustrated by the longstanding practice of overlooking greater settlement opportunities at the CO level. Disputes which should be settled needlessly pass through the hands of the CO and into litigation, feeding the conditions of increased cost and increased delay. Litigation costs too much. It takes too long. It tends to separate rather than to harmonize the relationships between the contracting partners. Greater use of ADR at the CO level holds real promise of restoring the original purposes of the CDA.

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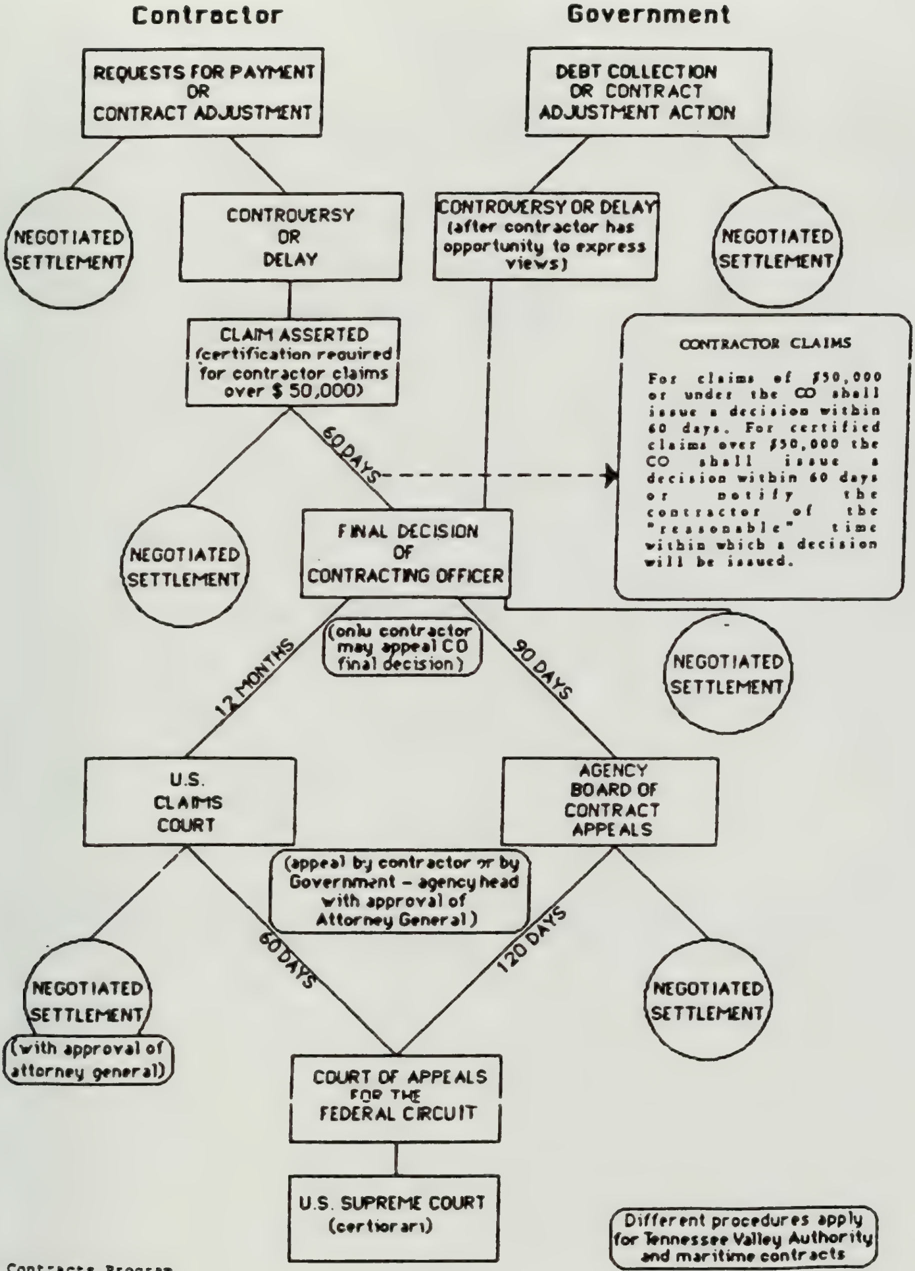
[120] Contractor enthusiasm for ADR may be slow-growing. For example, few Government contractors have agreed to participate in the Navy's pilot program of a summary binding procedure for small claims at the ASBCA. BNA: Daily Report for Executives, Oct. 4, 1988, p. 176. This program, of course, is available only after final decision by the CO and thus is distinguishable from the ADR use recommended in this report.

[121] Litigation of contract disputes sometimes produces an unnecessarily adversary relationship between opposing counsel. vonBaur, F. Trowbridge, The Breakdown of the Changes and Disputes Process, Pub. Cont. L.J. ___, 143.

[122] The disputes clause included in Government contracts is intended to provide a quick and efficient administrative remedy and to avoid "vexatious and expensive and to the contractor often times ruinous litigation." S&E Contractors, Inc. v. United States, 406 U.S. 1, 8 (1972)(Blackmun, J., concurring).

Greater use of ADR at the CO level can be promoted by establishing clear policy signals from the pinnacles of the Executive and Legislative Branches Government that ADR is okay. Practice of ADR methods at the CO level will grow as the contracting parties are stimulated and encouraged to employ these proven disputes resolution techniques.


Contractor
Government
REQUESTS FOR PAYMENT OR CONTRACT ADJUSTMENT
DEBT COLLECTION OR CONTRACT ADJUSTMENT ACTION
NEGOTIATED SETTLEMENT
CONTROVERSY OR DELAY
CONTROVERSY OR DELAY (after contractor has opportunity to express views)
NEGOTIATED SETTLEMENT
CLAIM ASSERTED (certification required for contractor claims over $ 50,000)
CONTRACTOR CLAIMS
60 DAYS
NEGOTIATED SETTLEMENT
FINAL DECISION OF CONTRACTING OFFICER
(only contractor may appeal CO final decision)
12 MONTHS
90 DAYS
NEGOTIATED SETTLEMENT
U.S. CLAIMS COURT
AGENCY BOARD OF CONTRACT APPEALS
(appeal by contractor or by Government – agency head with approval of Attorney General)
60 DAYS
120 DAYS
NEGOTIATED SETTLEMENT (with approval of attorney general)
NEGOTIATED SETTLEMENT
COURT OF APPEALS FOR THE FEDERAL CIRCUIT
U.S. SUPREME COURT (certiorari)
Different procedures apply for Tennessee Valley Authority and maritime contracts

For claims of $50,000 or under the CO shall issue a decision within 60 days. For certified claims over $50,000 the CO shall issue a decision within 60 days or notify the contractor of the "reasonable" time within which a decision will be issued.

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ge Washington University
1984

FINAL REPORT

CONFLICT-OF-INTEREST REQUIREMENTS
FOR MEMBERS OF
FEDERAL ADVISORY COMMITTEES

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May 1989

This is a report for the consideration of the Administrative Conference of the United States. The views expressed are those of the author, and do not necessarily reflect those of the Conference, its committees, or staff.

Conflict-of-Interest Requirements for Members of Federal Advisory Committees

The purpose of this study is to examine the conflict-of-interest requirements applicable to members of Federal advisory committees. Its scope includes not only an analysis of the legal requirements applicable to the various categories of members, but an examination of the practices of agencies in administering and applying these requirements, with a view to evaluating the efficiency and rationality of the present system, and formulating recommendations for improvements.

As the subsequent discussion will demonstrate, there are significant semantic problems involved in any discussion of the applicability of conflict-of-interest requirements to members of "advisory committees." This paper adopts a functional approach and includes within its scope all individuals and groups, other than full-time Federal employees, which perform advisory rather than operational functions for the Executive Branch or for any Federal agency. Even this definition has problems around the edges, but we should be able to refine our distinctions as we proceed.

This paper proceeds from two hypotheses: The first is that the law and practices regarding conflict-of-interest requirements have developed from the interaction of three statutory schemes, the Federal Advisory Committee Act, the conflict-of-interest laws, and the Federal personnel laws, none of which was drafted to deal specifically with conflict-of-interest standards for advisors to the Government, and that as a consequence this body of law contains anomalies and irrationalities which arise from applying classifications and distinctions which, however rational in their original context, have little or nothing to do with the question of what standards ought to be applied to such advisors. The second is that advisory committees perform a variety of roles in their relation to the federal decisionmaking process and that the conflict-of-interest standard to be applied to any committee member or members should take into account the nature of the committee's role and the ability of the decisionmaker to discount or offset possible bias deriving from conflict of interest.

Statutory Framework

Federal Advisory Committee Act

The Federal Advisory Committee Act (FACA), 5 U.S.C. App. §§1-15, was enacted in 1972. It seeks to regulate the establishment, operation and use of advisory committees to the Federal Government. The Act's definition of "advisory committee" is very broad. It has four key elements. The Act covers (1) any committee or similar group, (2) whose members include one or more individuals who are not full-time Federal employees, (3) established or utilized by the President or a Federal agency, (4) in the interest of obtaining advice or recommendations.

The regulatory scheme of the Act covers various aspects of advisory committee operations. The Act is aimed at a variety of real and perceived problems with Government advisory committees, that some did too much and others too little, that there was too little Federal control of their activities, review of their effectiveness, or follow-up on their recommendations, that advisory committees were not fairly balanced in their membership (particularly, in that many were perceived to have an industry bias), and that there was too little public access to their deliberations or to the results of their work.[1/] To deal with these problems, the Act provided a range of corrective measures. The Act requires chartering and periodic review of committees, it attempts to ensure greater responsibility in each agency for the operation of the committees which the agency establishes, it requires greater openness for advisory committees, through provision for publicly noticed and open meetings and publicly available minutes. Conflict-of-interest problems were not a principal focus of the Act. However, there was very definitely a suspicion that advisory committees, particularly in areas involving Federal regulatory programs, had an undue industry bias, and, consequently, one of the key provisions of the Act was to require that authorities establishing advisory committees should "require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed," and "assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority _or by any special interest_, but will instead be the result of the advisory committee's independent judgment." [emphasis added]. 5 U.S.C. App. §5(b),(c).

The coverage of the Federal Advisory Committee Act is very broad. While the term "advisory committee" was familiar in a general way, the classification did not previously carry particular legal consequences, and there was no body of law to which one could advert to determine what was or was not an advisory committee. The Act was designed to regulate agency practices and eliminate agency abuses in the establishment and use of advisory committees, and, therefore, Congress was unwilling to leave it to the agencies themselves to say what they would treat as a covered committee. Consequently, the statutory definitions were designed to prevent evasion, and from the start they created confusion and controversy.

The principal areas of confusion over coverage were (1) the so-called _ad hoc_ committees or groups, without formal organization, structure, or continuing existence, brought together to discuss problems with or present views to agency officials; and (2) privately established groups whose views were "utilized" by agency officials in the course of their decisionmaking.

Initial confusion over the status of _ad hoc_ groups and "utilized" committees was increased by early judicial rulings giving a broad inter-

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[1/] See, _e.g._, S. Rept. No. 92-1098, 92d Cong., 2d Sess. 3-4, Federal Advisory Committee Act Sourcebook, 155-56.

pretation to the statutory definition and by the failure of the agencies charged with providing guidance under the Act to do so.[2]

Finally, in response to a 1980 recommendation of the Administrative Conference of the U.S.,[3] the General Services Administration in its 1983 interim guidelines and its 1987 final rule on Federal Advisory Committee Management[4] attempted to narrow the coverage of the definition. To deal with the problem of the ad hoc groups, the GSA regulation excludes meetings with Government officials "for the purpose of exchanging facts or information," meetings initiated by the group for the purpose of presenting its views to an official or agency where the official does not use the group "recurrently as a preferred source of advice," and meetings initiated by a Federal official with more than one individual, where the official is seeking individual and not consensus advice or recommendations.[5] To deal with the problem of "utilized" committees, GSA adopted the view of the ACUS recommendation that a privately established committee is not "utilized" within the meaning of the Act unless the agency through institutional arrangements "adopts [the committee] as a preferred source of advice." 41 CFR §§101-6.1003, 6.1004.

The definitions in the GSA guidelines have provoked little controversy and have been useful in excluding from the scope of the Act the ordinary informal give-and-take between Government decisionmakers and the private sector. Yet they assuredly do not eliminate all problems of coverage. Indeed, they introduce new bases of distinction which in operation are likely to prove somewhat nebulous. What exactly is a "preferred source of advice?" Is there a real distinction between "obtaining the advice of individual attendees" and seeking "to obtain consensus advice or recommendations?"[6]

Underlying these largely semantic questions is a basic policy question. Is FACA to be viewed as limited to those advisory committees which might be termed "official" or "quasi-official" in that they are organized by or receive financial and/or logistical support from the Government? Or is FACA to be viewed as a more ambitious undertaking, as basically a requirement governing substantially all situations in which the Government actively seeks advice from the private sector? Some aspects of FACA point in each direction. The provisions on committee charters, periodic review, etc., make sense only as applied to those committees which are, realistically, a part of Government. The requirements with respect to openness and membership balance seem to speak more broadly to the entire process by which Government receives outside advice. So long as this dualism remains, questions of coverage are likely to persist.

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[2] See National Nutritional Foods Assn. v. Califano, 603 F.2d 327, 334-36 (2d Cir. 1979), reviewing the legislative, administrative and judicial authorities.

[3] Recommendation 80-3, 1 CFR §305.80-3.

[4] 41 CFR Part 101-6, 52 F.R. 45926.

[5] 41 CFR §101-6.1004(i), (j), (l).

[6] See NRDC v. Herrington, 637 F.Supp. 116 (D.D.C. 1986) holding that members of a scientific panel brought together to advise the Department of Energy in an examination of the safety of DOE's Hanford, Wash. plutonium reactor were not an advisory committee because they were being asked to provide individual views and not to act as a committee. The Court indicated that it was not disposed to interpret FACA broadly in situations which do not raise the problems that Congress was concerned about when it enacted FACA.

One noteworthy fact about FACA and its administration is that the Act purports to apply equally to all covered advisory committees regardless of their function.[7] Obviously, advisory committees are established and employed for many different purposes: to tap a source of expertise not available within the Government, to secure the views of interest groups affected by Government policy, to provide an objective critique of a Government program or activity, to develop a broad consensus on a delicate or controversial issue, and even to provide an excuse for inaction.

Various attempts have been made to break the committees down into rough functional categories. Prof. Cardozo listed five functional categories: policy advice, technical advice, fact-finding, evaluation of proposals and applications, and advice in personnel selection.[8] Wegman cites four categories: peer or grant review committees, technical or program review committees, special fact-finding or investigative committees, and general policy advisory committees.[9] The Annual Report of the President on Federal Advisory Committees for Fiscal Year 1987, prepared by GSA's Committee Management Secretariat, lists six functional groups for committees: scientific/technical program, non-scientific program, grant review, major national policy/issue, regulatory negotiation, and "other".[10]

While these categorizations are helpful in describing what it is advisory committees do, they cannot weigh precisely the relative significance of committees' recommendations to the decisionmaking process. It seems likely, however, that the most influential committees, i.e. those whose recommendations correlate most closely with the final governmental action, would be the grant review committees and those committees which provide a technical expertise which the Government does not have in-house. Conversely, on matters of broad policy the governmental decisionmaking authority, whether an agency, the President or Congress, is less likely to defer to the committee judgment, and the committee's influence is likely to depend on the persuasiveness of its report, the political acceptability of its proposals, and a variety of other considerations. Obviously, the greater the committee's influence on the decisionmaking process, the more important it becomes to prevent conflicts of interest.

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[7] However, judicial decisions suggest that only parts of the Act may be applicable to "utilized" committees, see, Center for Auto Safety v. Cox, 580 F.2d 689, 694 (D.C. Cir. 1978); Washington Legal Foundation v. American Bar Association, 648 F.Supp. 1353, 1360-61 (D.D.C. 1986).

[8] Cardozo, The Federal Advisory Committee Act in Operation, 33 Ad.L.Rev. ____ (1981), 1980 ACUS 313, 343.

[9] Wegman, The Utilization and Management of Federal Advisory Committees (1983) pp. 29-31. If we lump Prof. Cardozo's last two categories, which are in some respects similar, his classifications and Wegman's are essentially the same.

[10] Sixteenth Annual Report of the President on Federal Advisory Committees, p. 2. The breakdown is based on the sponsoring agency's categorization. The regulatory negotiation category accounted for less than 1% of the total.

For purposes of this paper, the point to be emphasized is that FACA, and particularly FACA in its broader reading, embraces committees and similar groups with a great variety of functions, organizational structures and ties, relationships and obligations to the Federal Government. Indeed, perhaps the only element common to all covered advisory committees is that in some way and for some reason they are looked to by the Federal decisionmaker as "a preferred source of advice."

Conflict-of-Interest Requirements

FACA, as we have seen, prescribes no conflict-of-interest requirements for advisory committee members. Indeed, it might be argued that it adopts an alternative approach for obtaining objective advice. FACA's requirement that committees be "fairly balanced in terms of the points of view represented," is tacit recognition that members are not expected to approach their agenda with Olympian detachment, although the very next statutory injunction, "that the advice and recommendations * * * will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment," certainly asks the members to walk a very thin line.

At any rate, FACA was not enacted in a vacuum, and it may be assumed that the drafters were aware of the general framework of legal requirements governing conflicts of interest of advisory committee members. The most significant of those requirements are those imposed by 18 U.S. Code Chapter 11, entitled "Bribery, Graft, and Conflicts of Interest."

18 U.S.C. Ch. 11 is applicable to Federal employees generally, and many of its provisions go back to the nineteenth century. However, the statutes were thoroughly revised in 1962 by Public Law 87-849. One of the principal contributions of P.L. 87-849 was to distinguish for purposes of conflict-of-interest requirements between full-time Federal employees and "those who serve the Government intermittently or for a short period of time," and to except persons in the latter category from certain of the prohibitions imposed on ordinary full-time employees.

To this end P.L. 87-849 created the category of "special Government employee" (hereinafter SGE), defined as "an officer or employee * * * who is retained, designated, appointed or employed to perform, with or without compensation, * * * temporary duties either on a full-time or intermittent basis" for not to exceed 130 days in any 365-day period, 18 U.S.C. §202(a).

The various prohibitions of 18 U.S.C. Ch. 11 are complicated, but may be described generally as follows:[11]

18 U.S.C. §201 prohibits bribery of public officials and witnesses in Federal proceedings. It punishes both the giving and the receiving of bribes. The term "public official" includes any person "acting for or on behalf of the United States * * * in any official function." The term has been interpreted broadly, see Dixson v. United States, 465 U.S. 482 (1984),[12] and probably would include members of Federal advisory committees who are SGE's and arguably even those who are independent contractors. It is unlikely that this provision would cover one who is advising as a representative of an outside group.

18 U.S.C. §§203 and 205 deal with representation of a private party by a Government employee in a judicial or administrative matter in which the United States is a party or has a direct or substantial interest. A regular Government employee may not represent another person before an agency or a court in such a proceeding, with or without compensation. An SGE is subject to much more limited prohibitions. (1) He may not represent anyone else before a court or agency in a matter in which the United States is a party or has a direct and substantial interest where the matter involves a specific party or parties and where he has at any time participated personally and substantially in the same matter in the course of his Government employment. (2) If the SGE has served in his agency more than 60 days in the past 365 days he may not represent anyone in a matter before that agency involving a specific party or parties. (It should be noted that in conflict-of-interest parlance, particular matter involving a specific party or parties is a relatively narrow concept and does not include a rulemaking of general applicability.)[13]

18 U.S.C. §207 deals primarily with post-employment restrictions. With respect to both regular and special Government employees, section 207(a) imposes a permanent ban on representation in connection with a particular matter involving a specific party or parties, where the employee participated personally and substantially in the decisional process in the course of his Government service. Section 207(b) imposes a two-year ban on representation with respect to a particular matter involving a specific party or parties when the matter was actually pending under the former employee's official responsibility within one year prior to his leaving Government. It also imposes a two-year ban on certain kinds of assistance in representation by so-

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[11] Chapter 11 consists of sections 201-219 and 224. However, only sections 201-03, 205, 207-09, 218 and 219 have relevance to the subject of this paper.

[12] In Dixson the Court held, 5-4, that officers of a private non-profit corporation administering community development grants as the designee of a local governmental grantee were "public officials" under section 201.

[13] There is considerable overlap between sections 203 and 205. According to the explanatory memorandum of the Department of Justice, "for all practical purposes Section 205 completely overshadows Section 203 in respect of officers and employees of the Government." Section 203, however, also covers Members of Congress.

called Senior Employees[14/] with respect to particular matters involving specific parties in which they participated personally and substantially while in Government employment. Section 207(b) does not exclude SGE's from its operation, but it is unlikely to impact very frequently on SGE's because they are rarely Senior Employees and do not usually have such particular matters pending under their official responsibility. ("Official responsibility" is defined, §202(b), as "direct administrative or operating authority" and presumably would not include the responsibilities of an employee serving in an advisory capacity.)

Section 207(c) applies exclusively to Senior Employees, including SGE's who serve for more than 60 days in a calendar year, and forbids for one year after employment with the agency has ceased any representational activity before that agency irrespective of the subject matter.

Section 207(g) is the only provision in section 207 not addressed to post-employment activities. It prohibits a partner of a Government employee from acting as agent or attorney before any agency or court with respect to any particular matter (not qualified by "involving a specific party or parties") in which the employee has participated personally and substantially. This provision is specifically applicable to SGE's. Because the "particular matters" to which it applies need not involve specific parties, section 207(g) has the anomalous effect of prohibiting representation by a partner of an SGE in circumstances in which the SGE himself would not be barred by section 203(b) or section 205(b).

18 U.S.C. §208 is the most important conflict-of-interest provision for purposes of our inquiry. Section 208 prohibits a Government employee, including an SGE, from participating "personally and substantially" as a Government employee "through decision, * * * recommendation, the rendering of advice, investigation, or otherwise, in * * * [any] particular matter in which to his knowledge, he, his spouse, minor child, partner, organization * * * has a financial interest." This is an especially broad prohibition in several respects. "Particular matter" is not qualified by the words "involving a specific party or parties" and has been interpreted very broadly by the Department of Justice.[15/] It does include adoption of rules of general applicability. Second, the participation which is forbidden includes the rendering of advice. Third, the range of financial interests it reaches is broad, and there is within the statute itself no de minimis exception. However, because of its very breadth the statute itself recognizes a need for

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[14/] "Senior Employee" is a term defined in OPM regulations, 5 CFR §737.25, to refer to those employees specified in or designated pursuant to 18 U.S.C. §207(d)(1).

[15/] In a 1978 opinion the Office of Legal Counsel, Department of Justice stated, "[W]e have consistently interpreted §208(a) to apply to rule-making proceedings or advisory committee deliberations of general applicability where the outcome may have a 'direct and predictable effect' on a firm with which the Government employee is affiliated, even though all other firms similarly situated will be affected in a like manner," 2 Ops. OLC 151, 155 (1978).

exceptions. Accordingly, section 208(b) provides for waivers by the employing agency (1) in particular cases where the employee discloses to the appointing official the conflicting financial interest and the appointing official makes a written determination that "the interest is not so substantial as to be deemed likely to affect the integrity of the services" of the employee, and (2) where the agency by general rule exempts certain financial interests as "too remote or too inconsequential to affect the integrity" of employees' services.[16]

18 U.S.C. §209, which forbids a Government employee to receive any salary or supplement as compensation for his services to the Government, is specifically made inapplicable to SGE's.

If we consider the potential impact of 18 U.S.C. §§201-09 on SGE's who are advisory committee members, it is evident that the principal trouble spot is section 208. Section 201 is broad in coverage, but hardly a trap for the unwary. The prohibitions in sections 203 and 205 are narrow, and, at least, as applied to lawyers, no more than common sense and the Canons of Ethics would require.[17] The revolving door provision of section 207(a) is likewise narrow and reasonable, and the broader prohibitions of sections 207(b) and (c) are not likely to apply to many advisory committee members.[18] Section 207(g), the prohibition on representational activity by a partner of an employee, is worth special attention because it may come into play in unforeseen and rather innocent circumstances, particularly where an advisory committee member is a member of a large law firm. However, section 207(g) applies primarily to lawyers in private practice, and a relatively small number of committee members are lawyers.[19]

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[16] Where agencies have used their authority to exempt by general rule under section 208(b)(2) the exemption has almost invariably been for described types of financial holdings, such as bank deposits, insurance policies, Government and municipal bonds, and interests in diversified mutual funds. See, e.g., 15 CFR §0.735-13 (Dept. of Commerce); 40 CFR §3.301(b) (EPA); 24 CFR §0.735-204(d) (HUD); 16 CFR §5.8(d) (FTC). The Administrative Conference of the United States, however, has adopted a section 208(b)(2) rule defining certain agency actions as too remote from a member's financial interests to affect the integrity of his services. 1 CFR §302.5(b)(2). This was done after the Department of Justice had ruled that public members of the Conference were special Government employees and that section 208 might reach a member's action in voting on a recommendation for procedural changes in an agency before which he practiced.

[17] Sections 203 and 205 do apply to any kind of representation, not merely representation as an attorney. For example, one who negotiates a contract with the Government on behalf of a corporation acts as an agent within the meaning of section 205. However, section 205 states that neither that section nor section 203 prevents an SGE from acting as agent or attorney for another in the performance of work under a Government grant or contract where the head of the department or agency certifies that the national interest so requires. But this exemptive authority may have been significantly limited by the 1988 amendment to the Office of Federal Procurement Policy Act, P.L. 100-679, §6, 41 U.S.C. 423(e), which prohibits any Government employee who participated personally and substantially in the conduct of an agency procurement from participating personally and substantially in the performance of the contract arising out of such procurement.

Section 208, on the other hand, is very broad, as I have pointed out. Since it covers rulemaking of general applicability, as well as substantially any other kind of agency action, an SGE who serves on an advisory committee which is making a recommendation respecting a rule that would affect the industry to which he has financial or employment ties would be bound to recuse himself unless he received a waiver from the agency under section 208(b).

The Federal Personnel Manual recognizes this problem and encourages the use of waivers where "the special Government employee renders advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization." FPM, p. 735-C-4. The Office of Legal Counsel has observed that this provision of the Manual constitutes a "gloss" on the statutory language of section 208(b)(1) that "the interest 'is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect' from the special Government employee" and seems particularly geared to "members of advisory committees, who are often specifically chosen because of an expertise that results from this affiliation with particular organizations, firms, or groups having a general interest in the very matters before the advisory committee." However, OLC emphasized that the exemption process "compels the responsible Agency official to focus on the questions of the special Government employee's outside affiliations and to make a specific written finding with respect to the expected integrity of the individual's services."[20]

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[18] Another post-employment restriction with potential application to some advisory committee members is contained in the new procurement integrity section of the Office of Federal Procurement Policy Act, 41 U.S.C. §423, added by P.L. 100-679, §6. Section 423(e) provides that "no Government official * * * who has participated personally and substantially in the conduct of any Federal agency procurement" shall for two years thereafter either participate in any manner on behalf of a contractor in negotiations leading to the award, modification or extension of the contract which is the subject of the procurement or participate personally or substantially in the performance of such contract. This prohibition applies to special Government employees and thus could, in theory at least, reach SGE's who serve on advisory committees. Whether an advisory committee would ever be sufficiently involved in the procurement process to meet the personal and substantial participation test of section 423(e) is a more difficult question. An OFPP guidance memorandum of April 7, 1989 on section 423 states, "We expect that special Government employees would rarely participate personally and substantially in the conduct of a procurement." However, it seems clear from the statute that participation includes acting in an advisory capacity, see §423(n)(3)(B), so that the possibility of the prohibitions applying to members of an advisory committee cannot be ruled out. There is no provision in section 423 for waiver of its substantive prohibitions. (Section 423 was scheduled to take effect May 16, 1989, but legislation has just been enacted extending the effective date 60 days to enable the Administration to explain its terms to covered employees and contractors.)

[19] According to the Seventeenth Annual Report of the President on Federal Advisory Committees, only 763 (3.8%) of the approximately 20,000 members of advisory committees are lawyers. Presumably this figure includes Government lawyers.

Two other provisions of 18 U.S.C. Ch. 11 are worth brief mention. Section 219 makes it a criminal offense for a public official to act as an agent of a foreign principal required to register under the Foreign Agents Registration Act of 1938, 22 U.S.C. §§611-621. The prohibition applies to special Government employees, but section 219(b) authorizes a waiver for an SGE where "the head of the employing agency certifies that such employment is required in the national interest." Although the Foreign Agents Registration Act does not apply to ordinary legal representation before courts and agencies, it does apply where the representation includes "attempts to influence or persuade agency personnel or officials other than in the course of established agency proceedings," 22 U.S.C. §613(g); see 28 CFR §5.306. Approximately 100 law firms are registered under the Act. The Act also reaches legislative lobbying and public relations activities on behalf of foreign principals.

Finally, 18 U.S.C. §218 authorizes the President and the heads of Federal departments and agencies to "declare void and rescind any contract, loan, grant, subsidy, license, right, permit, * * * ruling, decision, opinion or rate schedule * * * in relation to which there has been a final conviction for any violation of this chapter * * *." However, the possibility for voiding a Government decision tainted by a violation of the conflict-of-interest laws is not limited to the situation in which there has been a criminal conviction. Prior to the enactment of P.L. 87-849, the 1962 legislation, the Supreme Court had held in the well-known Dixon-Yates case, United States v. Mississippi Valley Generating Co., 364 U.S.520 (1961), that the United States was entitled to cancel a contract in the negotiation of which there had been a violation of the predecessor statute to section 208, notwithstanding that no criminal prosecution had ever been brought. In its explanatory memorandum on P.L. 87-849, the Department of Justice stated with respect to section 218 that since the powers it grants are "in addition to any other remedies provided by law" it would not seem to override the Dixon-Yates case. At least one case has held that the Government may disavow a contract where there was a violation of section 208 notwithstanding the absence of a criminal conviction, K. & R. Engineering Co. v. United States, 616 F.2d 469, 472-75 (Ct. Claims 1980); see, also, United States v. Medico Industries, 784 F.2d 840, 844-46 (7th Cir. 1986).

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[20] 2 Ops. OLC 151, 156-57 (1978). If the Manual provision in question is read as exclusively applicable to section 208(b)(1), it would follow that waivers in such circumstances could be granted ad hoc but not by general rule. The Nuclear Regulatory Commission has stated that it is its policy to grant waivers to SGE's in the circumstances described, but such waivers must nevertheless be granted individually. 10 CFR §0.735-21(d).

While the potential for the Government's voiding its prior action or decision on the basis of a violation of the conflict-of-interest laws should not be overlooked, the likelihood that a violation by a member of an advisory committee would lead to such a result is rather slim, particularly so, where the advice rendered is on a broad policy issue, rather than on the disposition of a particular matter involving specific parties, such as a contract, grant or license.

Disclosure Requirements. In addition to the criminal prohibitions of 18 U.S.C. Ch. 11, SGE's are subject to certain financial disclosure provisions. Under Executive Order 11222 of May 8, 1965 and OPM regulations, 5 CFR §735.412, SGE's are required to file with the employing agency a confidential statement of other employment, including corporate directorships, trusteeships and similar affiliations, and such financial information as the appointing agency determines is relevant to the SGE's duties.[21] SGE's who are paid at the rate of a GS-16 or higher also must file the more elaborate public financial disclosure form (SF-278) required of high level Government officials by Title II of the Ethics in Government Act. Since the disclosure requirements are in addition to and not in lieu of the prohibitions in 18 U.S.C. Ch. 11, disclosure of a disqualifying financial interest does not of itself work an exemption from section 208. The burden is on the employee to obtain the appropriate waiver.

The Office of Government Ethics is at present revising the regulations governing the system of confidential financial reporting by Federal employees, including SGE's. The proposed regulations published December 2, 1986, would have expanded the reporting requirements for SGE's well beyond what has been generally required under Executive Order 11222, but because of provisions permitting agencies with OGE approval to "tailor" reporting requirements to their needs by asking for either more or less information and to exempt some individuals entirely, it is hard to gauge the impact precisely. The proposed regulation has met with considerable criticism, and one may anticipate significant changes in the final version.[22]

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[21] Section 306 of E.O. 11222, which prescribed financial disclosure requirements for SGE's, was stricken from the Order by E.O. 12565 of September 25, 1986 in order to permit development of a comprehensive system of financial reporting for employees in the Executive Branch under the Ethics in Government Act. See text at note 22, infra. However, the OPM regulation implementing section 306, 5 CFR §735.412, has remained in effect, as have the practices of nearly all agencies in requiring SGE's to file confidential statements.

The applicability of the provisions of 18 U.S.C. Ch. 11, as well as the financial disclosure requirements cited above, to SGE's depends exclusively on the SGE's employment status and not (except for the "responsibility" provision in section 207(b)) on the nature of their functions. In other words, these conflict-of-interest statutes do not distinguish between operational and advisory responsibilities. Nevertheless, Congress was well aware that SGE's frequently serve in advisory roles, and indeed the principal purpose of creating the category of SGE's was to ease the recruitment of experts and consultants whose main work was performed outside of Government.

Status of Advisory Committee Members

As we have seen, the category of special Government employee was established to deal with the conflict-of-interest problems arising from the situation of part-time or intermittent Government employees, serving with or without compensation, frequently in advisory roles. But because some part-time advisors are to be treated as SGE's, it does not follow that all must be. The variety of advisory relationships between persons in the private sector and decisionmakers in the Federal Government has been the source of some confusion.

The principal guidance to the agencies on the subject of the status of members of Federal advisory committees for purposes of the conflict-of-interest laws is a memorandum dated July 9, 1982 from the then Director of the Office of Government Ethics, J. Jackson Walter, to the heads of all Executive departments and agencies.[23] This memorandum reviewed at length the administrative practice in dealing with part-time Government advisors since shortly before the enactment of P.L. 87-849. The principal distinction which the Walter Memorandum pointed to was that between those advisory personnel who are selected because of their individual qualifications and those who are expected to act in a representative capacity for an industry, for labor or agriculture or some other group. This distinction, first enunciated in a memorandum from President Kennedy dated February 9, 1962 and entitled "Preventing Conflicts of Interest on the Part of Advisers and Consultants to the Government," has been maintained with revisions to take into account the provisions of P.L. 87-849, in the regulations of the Office of Personnel Management, Federal Personnel Manual, Part 735, Appendix C. The pertinent portion of Appendix C is worth quoting at length because, together with the Walter Memorandum, it remains the principal operative guidance to the agencies.

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[22] The proposed regulation, 51 F.R. 43359-65, would require covered employees, including SGE's, to report the source and nature (but, apparently, not the amount) of any investment income, and a description (but, apparently, not the value) of other assets held for production of income, the source of any earned income, and information respecting employment or affiliations with profit or non-profit organizations. Agencies would, however, have authority to exclude individuals from "all or a portion of the reporting requirements" on the basis of appropriate findings by the agency head. The regulations would exclude from coverage individuals "performing services for the United States as an independent contractor under a personal service contract."

[23] As the memorandum points out, "There is no substantive difference between an appointee providing advisory service individually and one doing so as a member of a committee." Walter Memorandum, p.2.

> "It is necessary occasionally to distinguish between consultants and advisers who are special Government employees and persons who are invited to appear at an agency in a representative capacity to speak for firms or an industry, or for labor or agriculture, or for any other recognizable group of persons, including, on occasion, the public at large. A consultant or adviser whose advice is obtained by an agency from time to time because of his individual qualifications and who serves in an independent capacity is an officer or employee of the Government. On the other hand, one who is requested to appear before a Government agency to present the views of a nongovernmental organization or group which he represents, or for which he is in a position to speak, does not act as a servant of the Government and is not its officer or employee. He is therefore not subject to the conflict of interest laws and is not within the scope of this chapter.
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> The following principles are useful in arriving at a determination whether a person is acting before an agency in a representative capacity:
>
> (1) A person who receives pay from the Government for his services as an adviser or consultant is its employee and not a representative of an outside group. The Government's payment of travel expenses and a per diem allowance, however, does not by itself make the recipient an employee.
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> (2) It is rare that a consultant or adviser who serves alone is acting in a representative capacity. Those who have representative roles are for the most part persons serving as members of an advisory committee or similar body utilized by a Government agency. It does not follow, however, that the members of every such body are acting as representatives and are therefore outside the range of the conflict of interest laws. This result is limited to the members of committees utilized to obtain the views of non-governmental groups or organizations.
>
> (3) The fact that a person is appointed by an agency to an advisory committee upon the recommendation of an outside group or organization tends to support the conclusion that he has a representative function.
>
> (4) Although members of a governmental advisory body who are expected to bind outside organizations are no doubt serving in a representative capacity, the absence of authority to bind outside groups does not require the conclusion that the members are Government employees. What is important is whether they function as spokesmen for non-

> governmental groups or organizations and not whether they can formally commit them.
>
> (5) When an adviser or consultant is in a position to act as a spokesman for the United States or a Government agency--as, for example, in an international conference--he is obviously acting as an officer or employee of the Government."

The Walter Memorandum recognizes, however, that the distinction set out in Appendix C between SGE's and private sector representatives does not exhaust the possibilities for classifying those who furnish advice to the Government. Advisory services may also be furnished through a contract, and in that case the advisor or advisors may be independent contractors.

One of the key indicia of the employment relation in the Government, as elsewhere, is that an employee must carry out his duties under the supervision of another employee. An independent contractor, the Walter Memorandum points out, "is not hired under the civil service laws and is not subject to the supervision that inheres in an employee-supervisor relationship in the civil service. More to the point, he is not an employee for the purposes of 18 U.S.C. §§202-09."

The Memorandum observes that the employee/independent contractor distinction is not often a problem because "committees are rarely brought into the service of an agency by means of a contract." But if the problem were to come up, the issue would be resolved under the ordinary legal principles which govern the distinction between employees and independent contractors.

> "However, it is worthwhile to mention an issue that could arise in connection with the conflict-of-interest statutes if an agency were to create an advisory committee and then enter into a contract with it or each of its members individually. The issue is whether the agency would in practice exercise supervision over the operations of the committee and the formulation of judgments by its members that was great enough to taint the contract as a device for concealing their true status as SGE's under §§202-209. If an agency, for example, were to convene a committee and award the members a contract pursuant to which they (1) produced, after independent study, an advisory paper dealing with a problem that the agency's staff was too busy to resolve on its own and (2) delivered the paper without antecedent clearance from the staff or agency head, the committee members would properly have been deemed contractors. However, if the committee worked routinely subject to the scrutiny of the staff and with a significant amount of guidance from it, the members would be open to the charge that they actually served as SGE's and were subject to §§202-209. As appears from these examples, the question is one of degree."

Still another distinction discussed in the Memorandum is the circumstance in which a Federal official receives "unsolicited, informal advice from an outside individual or group of individuals regarding a particular matter or issue of policy that is within his official responsibility. Or he may himself bring up an agency matter of policy issue informally with one or more outsiders in order to obtain their views. An incident of this sort sometimes prompts the inquiry whether the outsiders have become SGE's of the agency. In general, the answer is that they have not, for they are not possessed of appointments as employees nor do they perform a federal function." However, Mr. Walter felt compelled to subject this conclusion to a caveat:

> "An official should not hold informal meetings more or less regularly with a non-federal individual or group of individuals for the purpose of obtaining information or advice for the conduct of his office. If he does so, he may invite the argument that willy-nilly he has brought them within the range of 18 U.S.C. §§202-09." [emphasis added].

This portion of the Memorandum seems a departure from what is otherwise a very tightly reasoned discussion. It seems very doubtful that the mere frequency of meetings of one or more Federal officials with a group of individuals can "willy-nilly"[24] and contrary to the intentions of all concerned bring those individuals into an employment relation with the Government so as to subject them to the criminal sanctions of 18 U.S.C.§§202-09.

What we have here is basically the problem of the ad hoc advisory committee. But if we assume that at some point the informal ad hoc committee shades over into a committee covered by the FACA, does it necessarily follow that at the same point on the spectrum the committee members become SGE's? And if at that point the Federal official should comply with FACA and formalize these informal arrangements, are these committee members SGE's if he fails to do so? We must bear in mind that FACA and the conflict-of-interest laws have somewhat different purposes, that they impose different obligations and burdens, and that violations of their provisions entail very different consequences.

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[24] The term is well chosen for it comes from the Latin volens/nolens, willing or not willing. The notion of an advisor becoming a Federal employee "willy-nilly" has given the Department of Justice pause. "In the usual case [the employment] relationship is based on an identifiable act of appointment. However, an identifiable act of appointment may not be absolutely essential * * * in a particular case where the parties omitted it for the purpose of avoiding the application of the conflict-of-interest laws or perhaps where there was a firm mutual understanding that a relatively formal relationship existed." 1 Ops. OLC 20, 21 (1977).

In this opinion the Office of Legal Counsel concluded that a personal friend of the President who advised him almost daily on an informal basis on "a wide range of policy issues" did not thereby become a special Government employee. However, when the adviser called and chaired meetings attended by employees of various agencies and assumed responsibilities for coordinating Administration activities on a particular issue, OLC ruled that the adviser was engaged in a Governmental function and should receive a formal appointment.

The Walter Memorandum does not address still another problem raised by FACA, the members of "utilized" committees. The reason is doubtless that these committee members are assumed not to be subject to the conflict-of-interest laws because, by hypothesis, they have not been selected and, therefore, not appointed by a Federal official.

To sum up, in theory there appear to be at least five categories of members of Federal advisory committees in terms of conflict-of-interest law analysis (excluding regular Government employees serving in their official capacities):

1. Members selected by a Federal official to serve on a formally established advisory committee in their individual capacities with or without compensation.

2. Members selected to serve in a representative capacity, as described in Part 735, Appendix C of the Federal Personnel Manual.

3. Independent contractors who have been engaged by the Government to supply advice or recommendations pursuant to a contract and whose work is not supervised or controlled by a Federal employee.[25]

4. Members of an informal ad hoc group whose advisory activities have crossed the FACA threshold but who have not been "appointed in the civil service" within the meaning of 5 U.S.C. §2104 and §2105.

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[25] There is some question whether a committee which performs consultant services for the Government under a contract is an advisory committee under FACA. See Lombardo v. Handler, 397 F.Supp. 792, 797-800 (D.D.C. 1975) aff'd without op., 546 F.2d 1043 (D.C. Cir. 1976), cert. denied, 431 U.S. 932 (1977), citing legislative history to the effect that FACA "does not apply to persons or organizations which have contractual relationships with the Federal agencies nor to advisory committees not directly established by or for such agencies." 397 F.Supp. at 799, citing 118 Cong. Rec. 31421. On the other hand, Paul Weiss, GSA's Associate Administrator for Administration, recently stated in responding to a Congressional question regarding the applicability of FACA to advisory committees created in connection with the performance of Federal contracts: "[T]he test for inclusion under the Act is that the agency's contract requires that the advice of a group or other than contractor personnel be provided to the agency, and that the contractor has not merely solicited advice as part of the activities incidental to the performance of the contract." Hearing before the Senate Committee on Governmental Affairs, Department of Defense/Strategic Defense Initiative Organization Compliance with Federal Advisory Committee Act (4-19-88).

Agency responses to Senator Glenn's questionnaire, see text at note 31, infra, classified a few committee members as independent contractors.

5. Members of committees which are privately established but which are "utilized" by the Government as "a preferred source of advice."

The first category of advisory committee members are SGE's and are subject to the conflict-of-interest laws. All the other categories of members are not SGE's and are not subject to the conflict-of-interest laws.

This multiplicity of categories is in itself neither good nor bad. Most subjects in Government are complicated. The Federal Advisory Committee Act covers a very broad range of situations and relationships, and it is not surprising that in dealing with conflict-of-interest questions, distinctions must be made.

There are, however, two points which must strike an observer:

(1) The operative distinctions seem primarily conclusory and almost invariably questions of degree. Take, for example, the distinction -- crucial for purposes of conflict-of-interest coverage -- between a member selected as an individual and one selected as a representative. There are undoubtedly situations in which an agency is primarily interested in ascertaining the views of the industry or other interest group from which the member is selected. Some statutes establishing advisory committees even specify the representative character of the membership.[26] But agencies can generally obtain industry views on an issue without establishing an advisory committee. One would assume that in many situations what the agency is looking for is just the kind of borderline or hybrid situation the conflict-of-interest laws appear to rule out, that is to say, the honest judgment of someone who is forced to weigh his perception of the common good against the narrower interests or biases of the constituency from which he is selected.[27] Of course, the agency can resolve the problem on the legal level simply by classifying the members as representatives while hoping that in practice they can rise above mere representation. But it does seem to me, at least, that the either/or classification called for by Appendix C and the Walter Memorandum oversimplifies what is likely to be a spectrum of situations and a mix of motives on the part of all the participants.

One result of the difficulty in classifying advisory committee members is that the question of compensation -- the only "hard" indicium -- tends to become determinative. An uncompensated adviser may be an SGE, but a compensated adviser must be an SGE. Appendix C states flatly that "[a] person who receives pay from the Government for his services as an adviser or consultant is its employee and not a representative of an outside group." Therefore, if an agency desires to compensate a committee member, he must be treated as an SGE, even if his role on the committee is to "balance" the views of members serving as representatives of special interests.

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[26] See, note 29, infra.

[27] One might well ask, if what is desired from the member is a mere expression of the industry view, why have him work on a committee? The committee device implies an interest in developing a consensus through exchange of views, which in turn implies that the individual's own views are of interest to the agency. Of course, it may well be that the function of the committee is not so much to communicate the constituencies' views to the agency as to make the agency's actions more palatable to the constituencies.

While the question of compensation should doubtless be relevant in determining whether an adviser should be considered an SGE, I doubt that the flat rule stated in Appendix C is desirable or realistic. Presumably the agency benefits from advice received from persons acting in a representative role or capacity. Why should the agency be forbidden to pay them to do so? In other contexts such payments are allowed, as when an agency provides financial support for public interest representation in its proceedings.[28/] Indeed, when Congress has turned its attention to the problem in the course of establishing statutory advisory committees, it has on occasion provided for compensation for committee members who serve as representatives of outside interests.[29/] After all, it is not the fact of payment which creates the conflict of interest, but rather the existence of a conflict which is assumed to make payment inappropriate. In the case of representatives deliberately chosen as such, this assumption seems of doubtful validity.

Even more nebulous in this context is the distinction between the SGE and the independent contractor. If the key issue is supervision and control, the requirement of FACA that recommendations of the advisory committees "not be inappropriately influenced by the appointing authority * * * but will instead

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[28/] Opinion of the Comptroller General B-139703 (July 24, 1972); see, generally, Boyer, Expense-Reimbursing Public Participants in Administrative Rulemaking: The Federal Trade Commission Experience, 1979 ACUS 437, 438-46.

[29/] The legislation establishing the Technical Pipeline Safety Standards Committee, 49 U.S.C. App. §1673, and the Technical Hazardous-Liquid Pipeline Safety Standards Committee, 49 U.S.C. App. §2003, specifically provides compensation for the non-Federal members of the committees, and that such payments "shall not render members of the Committee employees or officials of the United States for any purpose." Similar provisions are in the legislation establishing the National Boating Safety Advisory Council, 46 U.S.C. §13110, and the National Highway Safety Advisory Committee, 23 U.S.C. §404. The Department of Transportation treats these members as representatives. The statute establishing the Advisory Council on Employee Welfare and Pension Benefit Plans, 29 U.S.C. §1142, provides that three members "shall be representatives of employee organizations" and three "shall be representatives of employees." It also provides that members shall be entitled to daily pay at the rate of a GS-18. The Department of Labor has felt compelled to classify these members as SGE's notwithstanding their representative role on the committee, and has provided appropriate waivers under section 208. On the other hand, where section 7 of the Occupational Safety and Health Act, 29 U.S.C. §656, authorized, but, in Labor's view, did not compel compensation for advisory committee members serving as representatives, Labor decided not to provide compensation in order to treat the members as representatives and not as SGE's.

be the result of the advisory committee's independent judgment" seems inconsistent with the conclusion that committee members are SGE's.

(2) But aside from the difficulties of applying these distinctions, there is the troubling question whether they make any sense in terms of the problem of conflicts of interest. The distinction between advisory committee members who are selected to exercise independent judgment and those who are selected to represent distinct interests is sound enough in theory whatever its difficulties of application. The problem is that it is not realistic in terms of the purposes of the agency in establishing the committee. Distinctions between SGE's and independent contractors in terms of conflict-of-interest requirements make little sense, even in theory. With respect to members of ad hoc or of utilized committees, the distinction can probably be justified by the practical impossibility of bringing the conflict-of-interest laws into play where the relationships to the Government are so tenuous. But that does not eliminate the danger of self-serving advice or obviate the need for some alternative mechanisms.

One of the issues I have researched is how agencies have administered the fine distinctions set forth in the Walter Memorandum. Given the number of agencies and committees involved,[30] it has simply not been feasible to examine on any systematic basis the correctness of the legal conclusions the agencies have reached. However, the information available suggests a tendency of agencies to adopt a policy of administrative convenience and to consider members as interest group representatives, at least in all doubtful cases.

In March, 1988, Chairman Glenn of the Senate Committee on Governmental Affairs sent a letter to the agencies asking twenty questions respecting their management of advisory committees. One question was: "Do you consider members of advisory committees to be regular government employees, special government employees, or independent contractors? What criteria has the agency established to make this determination?" I have examined the responses to this question from 25 agencies and obtained additional information through interviews at a half-dozen agencies. My conclusions are as follows:

1. Agencies tend to place (or at least, to report) all or nearly all non-Government members in the same category. Thus, the Department of Health and Human Services, the agency with the most committees and over 20% of the total committee members, reported, "Members of committees which are established to advise the Department are routinely appointed as special government employees." Other agencies which reported that all or nearly all members were SGE's included the Department of Education, NASA, the United States Information

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[30] There were 992 advisory committees and 57 sponsoring agencies in fiscal 1987. Total membership was 19,837 individuals, of whom approximately 8% were full-time Federal employees. There is no breakdown on the status of the remaining membership. Sixteenth Annual Report of the President on Federal Advisory Committees, pp. 1-2, 7, 9. In fiscal 1988, 58 departments and agencies sponsored 1,020 committees, and a total of 21,236 individuals served as committee members. Seventeenth Annual Report of the President on Federal Advisory Committees, p. 1.

Agency, and the Nuclear Regulatory Commission. On the other hand, the Department of Transportation, with over 20 committees and over 500 members, reported that all its advisory committee members served as representatives, and the Department of the Interior, with approximately 150 committees and over 1,500 members, reported that the members of only one committee were considered SGE's; all other committees were made up of members serving in a representative capacity. Other agencies reporting that their members were all or mostly representatives included the Department of Energy, the Department of the Treasury, the Office of the United States Trade Representative, the Eximbank, the Federal Home Loan Bank Board, the Federal Mediation and Conciliation Service, and the Small Business Administration.31/ Although many agencies cited the 1982 Walter Memorandum as their principal source of guidance, my impression (possibly unfair) is that of the agencies whose responses I reviewed, only the Department of Labor and EPA have attempted to apply the criteria on a case-by-case basis. Four agencies reported that some committee members were serving as independent contractors.

2. In at least two instances, committee members who were clearly SGE's under the Walter Memorandum and FPM guidelines were classified as representatives for reasons of administrative convenience. (Neither instance involved significant potential for conflict of interest.) Several agencies reported as a basis for not treating members as SGE's that they received no compensation for their services, a consideration which should not be controlling under the Walter Memorandum.

3. Agencies, by and large, do not demand financial disclosure from committee members who are not SGE's. The National Endowment for the Humanities classifies its advisory committee members as independent contractors. However, since the committees make recommendations with respect to award of grants, the Endowment reported that it took precautions to avoid appointing panelists to review applications from institutions with which they were affiliated. (The replies are too sketchy to get an adequate idea of agency efforts to brief non-SGE members on conflict problems.)

Availability of Waivers

While the distinctions in classifications of advisory committee members seem confusing and arbitrary, the waiver authority in 18 U.S.C. §208 does offer an avenue of relief from the threat of criminal liability, and it is used, at least in some agencies. However, there appear to be a number of drawbacks:

(a) Some agencies, notably the Department of Defense, are extremely reluctant to issue section 208 waivers. This policy may increase the pressure

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31/ These agency replies expressly or impliedly exclude from consideration committee members who are full-time Federal employees. However, the membership figures cited, which I have drawn from the Sixteenth Annual Report, are total committee membership.

on those officials responsible for establishing advisory committees to find ways to avoid classifying their members as SGE's.[32]

(b) Doubts have been expressed whether a section 208(b) waiver may be granted where the financial interest in question is not insubstantial in an absolute sense, even though the agency concludes that any bias arising from that interest may be offset through committee balance or, perhaps, discounted as a result of disclosure. Because of these doubts the President's Commission on Federal Ethics Law Reform is recommending an amendment to section 208 to authorize waivers for advisory committee members where the appointing authority determines, after review of the financial disclosure forms, that the need for the member's expertise outweighs the potential for conflict of interest. The Commission concluded that under the present statute, "officials with the authority to grant waivers are required to look in large measure at the magnitude of the financial interest in question."[33]

I do not believe the administrative interpretation of section 208 is as narrow as the Commission assumes. In the 1978 Office of Legal Counsel opinion previously discussed,[34] OLC addressed the issue of substantiality of interest and concluded on the basis of the contemporaneous understanding of the 1962 legislation and the subsequent administrative construction in the Federal Personnel Manual that a waiver may be granted to an advisory committee member even though his financial interest is not insubstantial in an absolute sense provided that he "renders advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization."[35] Nevertheless, agencies may not be sufficiently aware of their authority in these circumstances, or they may feel unwilling to subscribe to a determination that the conflicting interest is not "likely to affect the integrity" of the advice to be obtained. (In this respect the Commission's formulation -- "the need for a member's expertise outweighs the potential for conflict of interest" -- seems a more accurate statement of the basis for the determination.)

(c) The waiver process is not always smooth. In a case brought to the attention of the Glenn Committee the President's AIDS Commission had been assembled and had conducted several public meetings before it was realized that the members' affiliations with health care providers, medical research institutions and other private entities might constitute conflicting financial interests. Waivers were hastily granted, but only after the members had, all unknowingly, been exposed to criminal liability.[36]

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[32] The President's Commission on Federal Ethics Law Reform points out that "an undesirable stigma already attends the seeking of waivers," and it stated its belief that "waivers should be granted more frequently instead of discouraged." These comments were directed at the administration of section 208(b) generally, but they are also relevant to advisory committees. To Serve with Honor, Report of the President's Commission on Federal Ethics Law Reform (1989), p. 24.

[33] Ibid., p. 30.

[34] See text at note 20, supra.

[35] 2 Ops. OLC 151, 156 (1978), quoting from the FPM Ch. 735, App. C.

(d) Waivers tend to be limited in scope and to place the burden on the member to anticipate potential conflicts outside that scope. Let me quote from a sample waiver letter to a committee member from the Secretary of Labor:

> "I have determined pursuant to 18 U.S.C. 208(b)(1) that the personal financial interests you have disclosed are not so substantial as to be deemed likely to affect the services you will provide * * * when those services are on matters of broad policy or general applicability. On these matters the provisions of 18 U.S.C. 208(a) are waived. This waiver would not extend to matters which may have a direct, predictable and unique effect on your financial interests or the interests of other related and associated persons covered by 18 U.S.C. * * *."

Should a member's lawyer advise him to take the job under such a limited waiver? It is true that the waiver tracks the line of distinction set forth in the FPM and the OLC opinion. But it is the agency and not the advisory committee members which is supposed to set the committee's agenda, and it seems reasonable to expect the agency to be in a better position than the individual member -- once financial disclosure has been made -- to anticipate and guard against conflicts of interest. Accordingly, where waivers are used, it would be far better for the agency to set out in the waiver what the committee is expected to do, what conflicting interests have been disclosed, and its conclusion that so long as the committee stays within the former, the interests disclosed shall not be deemed disqualifying.

(e) Finally, waivers address only the section 208 problem. This is admittedly the most serious one, but there are others, including a minor irritant, the requirements of the Hatch Act, which would apply on any day when the member is performing committee service.[37]

Another such problem is the potential impact of the new procurement integrity provision of the Office of Federal Procurement Policy Act.[38] This legislation contains restrictions on employment discussions between "procurement officials" and competing contractors during the conduct of a procurement, on the unauthorized disclosure of certain information regarding a procurement, and on the post-employment activities of Federal officials involved in a procurement. Whether this legislation will affect any advisory committees will depend on how broadly the procurement process is defined, and thus far this definition has proved elusive.[39] To the extent the statute applies to advisory committees, the applicability of the revolving door provision, §423(e), and possibly the restriction on employment discussions, §423(a), (b), will depend on whether the committee member is regarded as an SGE. Significantly, section 423, unlike 18 U.S.C. §208, contains no agency authority to exempt insignificant conflicts of interest.

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[36] U.S. General Accounting Office, Report to the Chairman, Committee on Governmental Affairs, U.S. Senate, GAO/GGD-89-17 AIDS Commission Compliance with FACA.

[37] The Hatch Act, 5 U.S.C. §§7324-27, restricts partisan political activity by Federal employees. It applies to SGE's only on the days they perform Government services, 5 CFR §733.123(b).

[38] 41 U.S.C. §423. See note 18, supra.

Conclusions and Recommendations

1. The principal conclusion of this study is that the present distinctions among advisory committee members between special Government employees, on the one hand, and representatives and independent contractors, on the other, are extremely fine, difficult to administer consistently, and, in any event, cannot be justified in terms of protecting the Government from self-interested advice. In practice they result in agencies requiring too little disclosure from the members who are not SGE's, while imposing significant burdens, principally potential criminal liability, on those members who are SGE's.

2. The burdens associated with classification as an SGE, in terms of financial disclosure, potential criminal liability, Hatch Act coverage, contrast sharply with the minimal burdens on committee members who serve in any other capacity. Consequently, at least where committee service is not compensated, agencies are likely to avoid classifying members as SGE's.

One must recognize, of course, that the likelihood of actual criminal prosecution for an inadvertent violation of 18 U.S.C. Ch. 11 is remote. It is Department of Justice policy to bring criminal charges under these provisions only in situations involving aggravating circumstances. Nevertheless the possible embarrassment associated with a criminal investigation is something most committee members would seek to avoid. Furthermore, the Government has an obligation to its advisory committee members, many of whom serve for no or merely nominal compensation, not to expose them to even theoretical risks. Finally, overbroad and unrealistic prohibitions tend to debase the currency of ethics rules and may make the public indifferent to even serious violations.

3. Advisory committees vary greatly in their functions and in the degree to which conflicts of interest must be guarded against. Generally speaking, the need to avoid conflicts is greatest with respect to those committees

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[39] The drafters of the interim regulations to implement the procurement integrity provision confessed that "the vastly different types and nature of procurements conducted throughout the Federal Government make it impossible to identify one event that is common to all agencies, that constitutes the beginning of a procurement," 54 F.R. 20488. Nevertheless, the interim rule states that a procurement begins when an authorized agency official "determines that a specific agency need or requirement shall be satisfied by procurement," 48 CFR §3.104-7, 54 F.R. 20494. See, also, section 3.104-4(h)(2).

involved in reviewing grants or similar applications and those furnishing scientific or technical advice, whereas for those committees providing policy advice the avoidance of conflicting personal interests is less important than assurance that the agency is aware of those interests and able to discount possible bias where appropriate or to offset it through committee balance.

The thrust of the proposed recommendations is to:

(a) Require from each member of an advisory committee (excluding full-time Government employees) the same level of disclosure of employment, affiliations and financial interests, irrespective of the member's status as an SGE, contractor, or representative. The agencies should have authority to exclude from the disclosure requirement information, other than the individual's employment, not deemed relevant to the purposes and functions of the committee, much as they do now with respect to SGE's under former section 306 of E.O. 11222. Thus, where the committee is dealing with social rather than economic issues, or where the impact of its recommendations on identifiable financial interests is likely to be remote, it would be appropriate to require no financial information. Any willful misstatement in the disclosure document would be punishable under 18 U.S.C. §1001.

(b) Replace the present unsatisfactory bases of distinction among advisory committee members with specific authority in the agency to classify members of advisory committees as SGE's or non-SGE's on the basis of the function of the committee and the agency's expectations of the degree of objectivity to be expected of the member. In general, members of those advisory committees which advise on the disposition of particular matters involving specific parties, e.g., grant review committees, scientific advisory groups,[40/] would continue to be classified as special Government employees, whereas members of those committees which advise on matters of general policy would not. But the choice in each instance would be an explicit one by the agency, after consultation with the Office of Government Ethics.

The recommendation is limited to those committees formally established and whose members are selected by the Federal Government. It is, therefore, not coextensive with the coverage of the Federal Advisory Committee Act, nor would it apply to those ad hoc or informal committees which fall outside the coverage of FACA.

(c) The final paragraph is intended to deal with the anomaly in 18 U.S.C. Ch. 11 described on page 7 of the report. Because section 207(g) applies to "particular matters," while sections 203(c) and 205 apply more narrowly to representation with respect to particular matters "involving a specific party or parties," a partner of a special Government employee is at present under a broader disability with respect to representation than is the employee himself.

Finally, we can all agree, at a minimum, that if no changes are made in the coverage of the conflict-of-interest laws, as proposed herein or by the

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[40/] E.g., the Nuclear Regulatory Commission's Advisory Committee on Reactor Safeguards, which is an integral part of the NRC's licensing process, 42 U.S.C. §2039.

President's Commission, the agencies must do a better job of advising committee members and proposed committee members of their potential exposure. However remote the prospect of prosecution, the potential is there, it could lead to embarrassment, if nothing worse, and the Government owes it to these members, many of whom volunteer their services without compensation, to warn them of the risks and how they may be avoided. Agencies should make clear to each advisory committee appointee what his legal status is to be, and if he is classified as an SGE, he should be briefed on his conflict-of-interest exposure, not merely in general terms, as is frequently done, but also with particular reference to the anticipated agenda of the committee. One of the purposes of the Federal Advisory Committee Act was to increase agency control over the activities of its advisory committees, and with that control should go the responsibility for guiding the committee members through the pitfalls which their status entails.

REFORMING ASYLUM ADJUDICATION: ON NAVIGATING THE COAST OF BOHEMIA*

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† Professor of Law, University of Virginia. This Article is a revised and abbreviated version of a consultant's report that I presented to the Administrative Conference of the United States in May 1989. The views expressed here are my own and do not necessarily reflect the views of the Conference or of its committees. The formal recommendation adopted by the Conference on the basis of the report was published at 54 Fed. Reg. 28,964, 28,970-72 (1989) (codified at 1 C.F.R § 305.89-4 (1990)). I have expanded my treatment of these issues, and have incorporated considerable additional information on the asylum adjudication systems of several European countries and Canada, in a book to be published by Yale University Press.

The research support, advice and comments provided by the members and staff of the Administrative Conference have been of real assistance and are gratefully acknowledged. The other individuals whose help made this work possible, particularly government officials, private lawyers, and scholars, in Europe, Canada, and the United States, who generously sacrificed large blocks of time for interviews for this study or for review of the manuscript, are too numerous to list here, but their assistance is deeply appreciated. I am also especially grateful to the German Marshall Fund of the United States and the Ford Foundation, whose financial support made possible the European research, principally during sabbatical leave from law school teaching in 1984-85, when I was in residence at the Henry-Dunant Institute in

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            a. *Diffusion of Responsibility* ....
            b. *Political Bias* ....
            c. *Inadequate Use of Existing Expertise*............
        3. Consistency and Quality Control ....
IV. PROPOSED REFORMS ....
    A. *Specialized Adjudicators* ....
    B. *Organizational Location* ....
    C. *Nature of the Proceedings* ....
    D. *Fairness and the Treatment of Legislative Facts* ....
    E. *Administrative Review* ....
        1. Administrative Review or Not? ....
        2. The Recommended Framework ....
        3. Country Guidelines ....
    F. *Judicial Review* ....
    G. *Deportation* ....
    H. *Emergency Responses to Large-Scale Influxes* ....
        1. Quick Denial of Manifestly Unfounded Applications ....
        2. Disqualification for Transit Through Third Countries ....
        3. Ending Work Authorizations and Making Alternative Arrangements for Subsistence Pending Adjudication ....
V. CONCLUSION ....

Over the last decade, sharply rising numbers of asylum seekers have placed great strains on the Western democracies' venerable practice of granting political asylum. In part, the new difficulties derive from the growing penetration of law into what once had been a largely discretionary practice; in part, they result from improved global mobility and communications. None of the challenged adjudication and protection systems have responded well, and some have responded abysmally.

Critics abound, offering widely variant views on what are the most serious problems besetting these systems. Some find the major problem to be that "economic migrants" or "false refugees" are able to gain years of delay, no matter how weak their asylum claims, by abusing the asylum process's abundant procedural protections, adopted to ensure against returning someone to immediate persecution. Others find the most serious failings to lie in governments' reflexively negative reactions to new arrivals, at least if they are of the wrong ideological stripe. Overly restrictive legal doctrine, impossibly demanding standards for factual proof, and a proliferating array of barriers and deterrents are seen as the major problems.[1]

In this country, controversy over political asylum waxed and waned throughout the 1980s. The decade opened with bitter contention, when the 1980 boatlift of 125,000 Cubans from the port of Mariel coincided with high levels of asylum applications from Haitians, Nicaraguans, and Iranians. In the succeeding years, the Reagan Administration implemented new restrictive policies, including detention of many asylum applicants and the interdiction on the high seas of boats coming from Haiti. It thereby managed, through the middle of the decade, to keep application levels relatively modest and to relegate asylum to the shadows occupied by low-priority political issues. Refugee advocacy groups nonetheless kept up a volley of denunciations aimed at the new restrictions. They charged that these policies, and the low acceptance rates of applicants from Central America and the Caribbean, reflected political manipulation or racism or simple heartlessness. These groups complained that the government's practices violated legal obligations founded in statute and treaty.[2] In a pattern that has been long familiar in American asylum policy, several rounds of relatively unproductive litigation resulted, frequently marked by interventionist judicial rulings and unwise government reaction.[3]

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[1] *See generally* Martin, *The New Asylum Seekers*, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s 1 (D. Martin ed. 1988) (tracing the history of refugee protections from World War II to the present, highlighting new problems, and suggesting solutions).

[2] *See, e.g.*, G. LOESCHER & J. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT 170-208 (1986) (recounting controversies over asylum policy that brought into question the Carter and Reagan Administrations' commitment to the ideological neutrality of the 1980 Refugee Act); Meissner, *Reflections on the Refugee Act of 1980*, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s 63-64 (D. Martin ed. 1988) (criticizing the failure "to administer a judicious political asylum policy" for Salvadoran refugees, as prescribed by the 1980 Refugee Act); Scanlan, *Regulating Refugee Flow: Legal Alternatives and Obligations Under the Refugee Act of 1980*, 56 NOTRE DAME LAW. 618, 620-23 (1981) (discussing alleged violations of treaty).

In late 1988, these controversies returned to the front pages. Whereas this country received about 3000 asylum applicants per year in the 1970s, by December 1988, the Immigration and Naturalization Service (INS) was receiving 2000 applicants per week in South Texas alone, nearly all of them from Central America. Neither the basic paperwork, nor even minimally decent food and shelter could keep pace. Some commentators concentrated on the humanitarian plight of the individuals. Others worried about the burdens placed on state governments and local communities, especially since they believed that most of the applicants were abusing the system and that their success would only encourage more to come.[4] In response, INS quickly sought ways to deter new arrivals. Despite lawsuits and temporary restraining orders, by early spring 1989, INS implemented a policy providing for initial asylum decisions within one day of application, coupled with detention of all unsuccessful applicants in South Texas.[5]

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[3] Class-action suits over Haitian asylum seekers presented the first major challenges to the government's procedures for asylum adjudication and ultimately resulted in years of litigation, blocking return of nearly all affected persons. The first round, begun in 1975, focused on procedures for considering asylum claims lodged by excludable aliens. (Excludable aliens are those apprehended at the border before making an entry into the United States. When the government seeks to remove aliens who have entered, it must do so through deportation rather than exclusion proceedings.) The litigation history, including citations to the several reported decisions that resulted, is summarized in Sannon v. United States, 631 F.2d 1247, 1249-50 (5th Cir. 1980). The second round derived from a 1977-78 campaign by the Immigration and Naturalization Service (INS) to hasten removals of Haitian asylum applicants. Ultimately this "Haitian Program" was declared unlawful, and the court ordered INS to reprocess all class members' asylum claims. *See* Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. Unit B 1982). Moreover, the plaintiffs received a major attorneys' fee award under the Equal Access to Justice Act. *See* Haitian Refugee Center v. Meese, 791 F.2d 1489 (11th Cir.), *vacated in part on other grounds*, 804 F.2d 1573 (11th Cir. 1986).

In 1981, the Administration embarked on a new detention policy meant largely to deter asylum applications. *See* T. ALEINIKOFF & D. MARTIN, IMMIGRATION: PROCESS AND POLICY 722-24 (1985). Litigation challenging the detention policy went all the way to the Supreme Court in Jean v. Nelson, 472 U.S. 846 (1985). Although the government won some important victories with regard to legal doctrine, the plaintiffs prevailed sufficiently on their statutory and regulatory claims to delay asylum processing for lengthy periods, *see, e.g.*, Louis v. Meissner, 532 F. Supp. 881, 883-84, 889 (S.D. Fla. 1982) (refusing to dismiss refugees' claim that they were denied access to counsel contrary to INS regulations); Louis v. Nelson I, 544 F. Supp. 973, 993-96 (S.D. Fla. 1982) (holding that detention policy was illegal because it was a substantive rule that was not promulgated as required by the Administrative Procedure Act); Louis v. Nelson II, 544 F. Supp. 1004 (S.D. Fla. 1982) (holding that detained Haitians were entitled to release on parole pending determination of their claims for admission), and ultimately to gain a sizable attorneys' fee award. *See, e.g.*, Jean v. Nelson, 863 F.2d 759, 769-80 (11th Cir. 1988), *cert. granted sub nom.* INS v. Jean, 58 U.S.L.W. 3467 (U.S. Jan 23, 1990) (No. 89-601). Similar challenges to INS handling of Salvadoran and Guatemalan claims have likewise won initial successes. *See, e.g.*, Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1511 (C.D. Cal. 1988) (granting permanent injunction); Orantes-Hernandez v. Smith, 541 F. Supp. 351, 380 (C.D. Cal. 1982) (granting preliminary injunction); Nunez v. Boldin, 537 F. Supp. 578, 587 (S.D. Tex.) (also granting preliminary injunction), *appeal dismissed*, 692 F.2d 755 (5th Cir. 1982).

This action sharply reduced the concentrated influx, eased local alarms, and thereby succeeded in draining off much media interest. One might almost have thought that the annual application level dropped back to the politically tolerable mid-decade rate of around 20,000 per year. It did not. The inflow remained exceptionally high, but simply spread more widely throughout the country. In fiscal year 1989, the district offices of INS received over 100,000 applications—a record—and many thousands more were filed before immigration judges.[6] This pace continues. It would not be surprising to find the issue bursting into prominence again in the early 1990s, as the full extent of the new asylum caseload becomes apparent.

In nearly all Western countries, the asylum adjudication systems now employed were cobbled together in an era that permitted leisurely consideration of modest caseloads. In general, they have adapted poorly to an era when claims are numerous and subject to sudden escalation. Moreover, because most Western adjudication systems were built on the rough assumption (a product of the Cold War) that few claimants would be rejected, they avoided difficult questions about effective information-gathering and evaluation. Today's dilemmas require instead a sustained and sophisticated capacity to screen out unqualified applicants; hence, the difficult, previously latent questions have become inescapable. If adjudication systems are to say no to large numbers of applicants—as virtually all Western countries are now doing—they must either cultivate callousness to the risk of returning true refugees, or else demand assurance that their outcomes are precise and reliable.

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[4] *See, e.g.*, Suro, *Aliens Say New Curbs Won't Halt Them at Border*, N.Y. Times, Feb. 27, 1989, at A14, col. 1; Suro, *U.S. Set to Detain Refugees in Tents Beginning Today*, N.Y. Times, Feb. 21, 1989, at A1, col. 4; Schmalz, *Miami, Saying It's Overburdened, Tells Nicaraguans to Stay Away*, N.Y. Times, Jan. 14, 1989, at A1, col. 3; Applebome, *South Texans Fear an Influx of Aliens*, N.Y. Times, Dec. 16, 1988, at A22, col. 1.

[5] *See, e.g.*, *South Texas Asylum Applicants Face Detention Under New INS Policy*, 66 INTERPRETER RELEASES 217 (1989); Frelick, *South Texas Detention Plan Goes Forward*, REFUGEE REPORTS, Feb. 28, 1989, at 1 (discussing the new INS plan to restrict allegedly frivolous asylum claims and the resulting criticism from private agencies); Applebome, *Judge Halts Rule Stranding Aliens in Rio Grande Valley*, N.Y. Times, Jan. 10, 1989, at A14, col. 1; Applebome, *Suit Attacks Policy That Keeps Aliens in Texas*, N.Y. Times, Jan. 7, 1989, at 1, col. 3.

[6] *See infra* Table I following note 150. Immigration judges, originally known as special inquiry officers, are the federal officials who preside over deportation and exclusion proceedings. *See* T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 87-91.

The search for effective reforms continues, but in a highly polarized environment. In this Article, I attempt to advance that search, with special attention to the political asylum adjudication system of the United States. The analysis and recommendations offered here are based on several years of research and observation in the United States, Canada, and several European countries—including attendance at numerous hearings and extensive interviewing of participants in asylum processing systems, principally government officials, private attorneys, and other workers with refugee assistance and advocacy organizations.[7]

I open with a general look at the basic legal standards and then at the highly charged policy context in which all asylum decisions are currently made. To lay a foundation for the recommendations at the end, there follows an overview of the United States' current, tangled adjudication procedures and a brief history of past procedures, explaining how the present system evolved. I conclude by suggesting numerous changes in structure and process, some of them quite ambitious, while rejecting others that have been prominently advocated. I offer these proposals with the conviction that a well-functioning adjudication process provides the indispensable ingredient for alleviating the many ills now attributed to the system, even though the various participants in the current debate tender widely differing diagnoses of what are the most serious ailments.

I. THE SUBSTANTIVE LEGAL FRAMEWORK

A. *International Provisions*

Classically, the right of asylum under international law belonged to states and not to individuals.[8] Sovereigns were considered to have the right or prerogative to grant protection against return to those they chose to shelter. This framework shamed itself in the world's woefully inadequate response in the 1930s and 1940s to those who were fleeing Nazi persecution. From the ashes of World War II arose an international structure that signalled a determination, measured but genuine, to do more for refugees.

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[7] The longer version of this study, forthcoming from the Yale University Press, contains considerably more detail on the Canadian and European systems. *See supra* note †. I will refer directly to those systems only occasionally here, but the suggestions I make draw in large measure on what I learned in studying them.

[8] *See* G. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 101-02 (1983); 2 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 6 (1972); Melander, *Refugees and International Cooperation*, 15 INT'L MIGRATION REV. 35, 35 (1981).

Most enduring of the post-war measures were two instruments adopted under United Nations auspices. The first, accepted in late 1950, created a new post of UN High Commissioner for Refugees (UNHCR). Initially expected to be temporary, the Office of the UNHCR, staffed by approximately 2300 employees, has by now become a permanent fixture on the international scene.[9] Under its original statute and subsequent General Assembly resolutions, the office bears responsibility for providing protection and material assistance to refugees throughout the world.[10] In connection with its protection function, UNHCR monitors asylum adjudication systems worldwide, and occasionally plays a direct role in individual determinations.

The second legal instrument, the 1951 Convention Relating to the Status of Refugees,[11] remains of surpassing importance, for it established a definition that has become the centerpiece of most Western asylum adjudication systems, including that of the United States. Under that definition, as improved by the Convention's 1967 Protocol,[12] a refugee is a person outside her home country, unwilling or unable to return or otherwise claim that country's protection because of a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[13]

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[9] *See Overview of UNHCR Activities: Report for 1987-88*, at 87, U.N. Doc. A/AC.96/709 (1988) (Table IX).

[10] *See Statute of the Office of the UNHCR*, G.A. Res. 428, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775 (1950). Later changes in the scope of UNHCR responsibility are traced in Aga Khan, *Legal Problems Relating to Refugees and Displaced Persons*, 1976(I) RECUEIL DES COURS 287, 301-09.

[11] July 28, 1951, 189 U.N.T.S. 137 [hereinafter 1951 Convention] (adopted in Geneva).

[12] Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. The 1951 definition covered only those persons who feared persecution "[a]s a result of events occurring before 1 January 1951." 1951 Convention, *supra* note 11, art. 1(A)(2), 189 U.N.T.S. at 152. The main function of the 1967 Protocol was to remove this dateline. The United States became a party to the Protocol in 1968, thereby becoming derivatively bound by all the significant operative provisions of the 1951 Convention. *See* 1967 Protocol, *supra*, art. I(1), 19 U.S.T. at 6225, T.I.A.S. No. 6577, at 2, 606 U.N.T.S. at 268.

[13] 1951 Convention, *supra* note 11, art. 1(A)(2), 189 U.N.T.S. at 152. The

The 1951 Convention, a cautious and more limited treaty than is often appreciated,[14] provides relatively few actual guarantees to refugees illegally present in the country of haven (as most asylum seekers now are).[15] In particular, it does not guarantee asylum, in the sense of a durable lawful residence status, even for those duly adjudged to be refugees under its provisions. Thus even today there is no individual right of asylum under international law.[16] What the 1951 Convention does require, however, even for refugees illegally present, is *nonrefoulement*—a technical term for protection, deriving from Article 33 of the Convention, against return to a country "where [the refugee's] life or freedom would be threatened on account of her race, religion, nationality, membership of a particular social group or political opinion."[17] Article 33 affords a limited and country-specific protection, and the receiving nation technically

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definition also contains "cessation" and "exclusion" clauses that remove certain persons, such as those guilty of war crimes, or those who have taken on a new nationality, from the Convention's coverage. *See id.* art. 1(C)-(F), 189 U.N.T.S. at 154-56.

[14] *See* Haitian Refugee Center v. Gracey, 809 F.2d 794, 840-41 (D.C. Cir. 1987) (Edwards, J., concurring and dissenting) (concluding that the Refugee Act's applicability to aliens in both exclusion and deportation proceedings is more generous than required by the 1951 Convention and 1967 Protocol).

[15] The 1951 Convention does provide a host of impressively detailed guarantees for refugees lawfully present, but a decision that the person is a Convention refugee does not ipso facto result in lawful presence. *See Report of the Ad Hoc Comm. on Statelessness and Related Problems* 47, U.N. Doc. E/1618/Corr. 1; E/AC.32/5/Corr.1 (1950). *See generally* Weis, *The International Protection of Refugees*, 48 Am. J. Int'l L. 193, 193-207 (1954) (outlining the protection provisions of the 1951 Convention). The major purpose of the Convention, as the name suggests, was to clarify questions of status for the World War II refugees already in place. As Professor Goodwin-Gill has explained:

> The 1951 Convention was originally intended to establish, confirm or clarify the legal status of a known population of the displaced. This met the needs of the time, and most provisions focus on assimilation, or are premised on lawful residence or tolerated presence. There is nothing on asylum, on admission, or on resettlement.

Goodwin-Gill, *The Future of International Refugee Law*, Refugees, Oct. 1988, at 27, 28.

[16] An abortive effort was made in the 1970s to draft a convention that would go further toward international legal guarantees of political asylum for refugees. This effort was abandoned when a 1977 conference of government representatives appeared likely to weaken even those minimal guarantees derived from the 1951 Convention and the 1967 Protocol. *See* Weis, *The Draft United Nations Convention on Territorial Asylum*, 50 Brit. Y.B. Int'l L. 151, 159, 169-71 (1979).

[17] 1951 Convention, *supra* note 11, art. 33(1), 189 U.N.T.S. at 176. Paragraph (2) of this article authorizes narrow exceptions to the nonreturn obligation, essentially for spies and dangerous criminals.

remains free to send a refugee on to other countries, rather than granting asylum on its soil.[18]

Nevertheless, since 1951 most Western countries, to their credit, have set up asylum claims systems that essentially combine the determination of refugee status under the 1951 Convention definition with the discretionary act of providing durable status, or asylum. An affirmative refugee status determination thus routinely leads not only to the limited protection against return contemplated by Article 33, but also to the full range of protections embraced within the notion of asylum.[19] In this sense, we have come close to a system that guarantees an individual right of asylum to those who somehow establish physical presence on the soil of such Western countries and also prove that they satisfy the 1951 Convention definition.

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[18] *See* Melander, *supra* note 8, at 36. The country is also free, of course, to grant asylum to others it deems worthy, even if they do not satisfy the 1951 Convention definition. Western European countries have done this more extensively than the United States, through so-called "B-status" refugee provisions or the acceptance of "de facto refugees." *See generally* D. GALLAGHER, S. MARTIN & P. FAGEN, TEMPORARY SAFE HAVEN: THE NEED FOR NORTH AMERICAN-EUROPEAN RESPONSES (Refugee Policy Group 1987). The United States occasionally provides such protection, without a determination of refugee status, through the use of "extended voluntary departure" (EVD). *See generally* T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 726-43 (explaining EVD protection and the debates surrounding it); Note, *Temporary Safe Haven for De Facto Refugees from War, Violence and Disasters*, 28 VA. J. INT'L L. 509, 512 (1988) (arguing for the adoption of alternative methods of offering a temporary safe haven rather than the currently inadequate EVD system). Under current law, EVD is provided as a matter of grace by the political branches, according to ad hoc criteria that are essentially beyond the reach of judicial review. *See* Hotel and Restaurant Employees Union Local 25, v. Smith, 594 F. Supp. 502 (D.D.C. 1984), *aff'd by an equally divided court*, 846 F.2d 1499 (D.C. Cir. 1988); *see also* Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, § 902, 101 Stat. 1331 (1987) (establishing limited procedure for eventual permanent resident status for certain beneficiaries of EVD for the years 1982-87).

Although I believe that this country should extend such protection on carefully chosen occasions to potential victims of civil strife or human rights violations, I do not address here either the standards or procedures for such decisions. This study focuses instead on what are supposed to be nonpolitical procedures for implementing binding, neutral criteria adopted to shield those most seriously jeopardized by granting them full asylum or, at a minimum, *nonrefoulement*.

[19] *See* Hofmann, *Asylum and Refugee Law*, in THE LEGAL POSITION OF ALIENS IN NATIONAL AND INTERNATIONAL LAW 2045, 2058-59 (J. Frowein & T. Stein eds. 1987). In fact, Western nations (with a few exceptions, like Austria, traditionally viewed as transit countries) rarely find third countries willing to take refugees off their hands. Given that the refugees are present and, under Article 33, cannot be sent to the only country normally obligated to take them (the country of nationality), it is clearly better if they quickly attain a secure new status that allows them to rebuild normal lives. *See* Martin, *supra* note 1, at 18 n.26.

That these admirable features of the system go beyond the strict requirements of international law, however, should remind us of their fragility. They cannot be taken as inevitable constants. Instead, it must be an ever-present concern of wise policy to shape asylum measures, including adjudication systems, so as to maximize continued domestic support. The systems' inability to cope effectively with growing numbers of asylum seekers over the last decade now threatens that foundation.[20]

B. *American Legal Provisions*

The American legal framework follows these general outlines, but the details require some additional attention. Although the United States played a significant role in the conferences that led to adoption of the final text of the 1951 Convention, this country never became a party to that treaty. During that era, bitter battles over the Genocide Convention and the Bricker Amendment had resulted in ill-considered executive promises against sending any human rights treaties to the Senate for ratification.[21] Nevertheless, the United States regarded itself as a leading player in finding solutions to refugee problems. From the end of World War II, under a variety of statutory and administrative schemes, it had generously resettled hundreds of thousands of the displaced persons uprooted by that conflict.[22] That experience imprinted on American policy debates a distinctive perspective that predominated until quite recently: Responding to refugees meant resettling displaced persons from refugee camps overseas, rather than dealing with populations already on national territory.[23]

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[20] A recent book by a former UN Deputy High Commissioner for Refugees underscores these risks. Richard Smyser writes:

> The structure of refugee law and care, which has been generously assembled since the dawn of our culture and particularly in the twentieth century, cannot remain in place if it is abandoned by political and popular opinion. If the people of the world decide that they no longer wish to receive and help refugees, all the international conventions and organizations will be rendered useless and will prove unequal to the task of saving even a single life. That is a danger that must be averted.

W. SMYSER, REFUGEES: EXTENDED EXILE 2 (1987); *see also* Martin, *supra* note 1, at 11-15 (noting that "[p]olicy initiatives that will impose costs and difficulties on those publics in a highly visible way must ultimately be grounded in a widespread public acceptance of the need for that policy").

[21] *See generally* Kaufman & Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment,* 10 HUMAN RIGHTS Q. 309, 310-12 (1988) (discussing the Bricker Amendment and the executive branch's response). Public explanations of the U.S. position regarding the refugee treaty usually focused, with some justification, on how the 1951 Convention better fit European legal systems, where the status of an alien depended on reciprocity—unlike the United States, where refugees received a status equivalent to other permanent resident aliens. *See* Hoffman, *UN Refugee Code Near Completion: Watered-Down Bill of Rights Applies Mainly to Europe—Some Basic Gains Made,* N.Y. Times, July 21, 1951, at 4, col. 2. At other times American spokesmen stated that this country would not adhere because the treaty touched largely on matters within the jurisdiction of the states rather than the federal government. *See Eleven Nations Sign Refugee Rights Act,* N.Y. Times, July 29, 1951, at 15, col. 3.

Even during this period, however, some provision was made for the handful of individuals who somehow made it to American territory on their own and then asked not to be returned to face persecution. Congress enacted the first express statutory provision in 1950,[24] directing the Attorney General not to deport aliens to countries where they "would be subjected to physical persecution."[25]

In a more explicitly discretionary form, this provision was incorporated as section 243(h) of the newly codified Immigration and Nationality Act (INA) in 1952. It granted the Attorney General the discretion to "withhold deportation" of persons who would be subjected to physical persecution upon return.[26] In 1958, the Supreme Court ruled that this statutory provision applied only to deportation and was not available to aliens in exclusion proceedings,[27] but the INS made equivalent protections available to excludable aliens through the use of the parole power, likewise an expressly discretionary remedy.[28]

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[22] A comprehensive account appears in CONGRESSIONAL RESEARCH LIBRARY FOR THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES, 96TH CONG., 2D SESS., REVIEW OF U.S. REFUGEE RESETTLEMENT PROGRAMS AND POLICIES (Comm. Print 1980). For a more critical review, see G. LOESCHER & J. SCANLAN, *supra* note 2, at 1-67.

[23] *See* Meissner, *Reflections on the Refugee Act of 1980,* in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s 57, 60 (D. Martin ed. 1988). Sharply different policy constraints operate in the two settings, despite similarities in the governing threshold standards. *See infra* note 38.

[24] Related provisions had appeared, however, since 1875. They provided an exception to exclusion based on pre-entry conviction of a criminal offense, if the crime constituted a political offense. *See* T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 638 & n.13.

[25] Subversive Activities Control Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1010 (repealed 1952).

[26] Immigration and Nationality Act, ch. 477, § 243(h), 66 Stat. 163, 214 (1952) (codified at 8 U.S.C. § 1253(h) (1988)). In 1965, Congress deleted the reference to "physical persecution," replacing it with "persecution on account of race, religion, or political opinion." Act of Oct. 3, 1965, Pub. L. No. 89-236, § 11(f), 79 Stat. 911, 918. The Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107, gave the section its present shape, more closely tracking the language of Article 33 of the 1951 Convention.

[27] *See* Leng May Ma v. Barber, 357 U.S. 185 (1958).

By 1968, the earlier resistance to human rights treaties had softened sufficiently for the Johnson Administration to send the 1967 UN Protocol to the Senate, where it secured speedy ratification. Because the 1967 Protocol incorporates by reference all of the important operative provisions of the 1951 Convention, with one important modification in the definition of "refugee,"[29] ratification was tantamount to acceding to the earlier instrument. But this somewhat circuitous route toward accepting the 1951 obligations apparently helped avoid reopening any of the previous decade's treaty-power battles.

The Administration had promoted the 1967 Protocol primarily as a way of signalling U.S. leadership on worldwide refugee issues and encouraging other nations, regarded as less supportive of refugees, to improve protections. For that reason, political asylum issues drew little attention during the Senate's brief deliberations on the treaty.[30] An unexamined assumption that U.S. practices conformed fully to the 1951 Convention's requirements permeated the proceedings, and executive spokespersons assured the Senate that the 1967 Protocol could be implemented without changes in the statutes. Although this was true, the record suggests that the Senate probably did not fully appreciate the significance of the treaty with respect to the withholding of deportation. After accession to the 1967 Protocol, the United States came under a firm legal obligation to implement § 243(h), a discretionary provision, so as not to conflict with the mandatory requirements of Article 33 of the 1951 Convention, the *nonrefoulement* provision. In any event, the treaty deliberations clearly did not provoke consideration of any difficult issues concerning the substantive legal provisions or the adjudication procedures that would be used to implement them. No changes were made at the time in the substantive statutory requirements affecting political asylum.

There matters stood until Congress considered the bills that were to become the Refugee Act of 1980. The political branches took up refugee issues at that time primarily because of the difficulties encountered in coping with the massive refugee outflows from Indochina—classic overseas refugee issues.[31] Even though asylum applications were increasing throughout the period of legislative deliberation and a significant political and judicial controversy was brewing in Florida regarding Haitian asylum seekers, asylum was again largely a legislative afterthought. Nevertheless, Congress made some important improvements in the asylum realm, urged on by UNHCR and by activists who were becoming more vocal about domestic asylum issues. First—a matter of particular UNHCR concern—Congress changed INA § 243(h) to a mandatory form, leaving no doubt about the obligatory character of the *nonrefoulement* provisions in domestic law, and specifying that the provision applies to both exclusion and deportation.[32] Second, Congress finally added an express "asylum" provision to the INA, in the form of a new § 208.[33] It replaced earlier haphazard administrative practice with a new, express, and clarified immigration status for those recognized as refugees after applications filed in this country.

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[28] *See, e.g.*, 8 C.F.R. §§ 236.3(e), 253.1(f) (1978) (referring to limited circumstances in which otherwise excludable refugee aliens may benefit from parole). The general authorization for parole appears in INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1988). *See generally* T. Aleinikoff & D. Martin, *supra* note 3, 232-36.

[29] *See supra* note 12.

[30] *See* S. Exec. Doc. K, 90th Cong., 2d Sess. (1968) (transmittal materials from executive branch); S. Exec. Rep. No. 14, 90th Cong., 2d Sess. (1968) (Committee report on the 1967 Protocol, including a transcript of the hearings).

Section 208 states that the Attorney General has discretion to grant asylum to aliens who meet the definition of refugee provided in the new INA § 101(a)(42)(A).[34] That section, in turn, tracks the 1951 Convention definition; the central qualification is a "well-founded fear of persecution" on account of the same five factors listed in the Convention.[35] The new immigration status, called "asylee" in the regulations, clarifies the alien's entitlements to certain benefits in this country. It also enables him, after a minimum of one year as an asylee, to obtain full lawful permanent resident status through a statutorily authorized adjustment procedure.[36] No such regular adjustment procedure for asylees existed theretofore.[37]

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[31] *See* Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 30 (1981); Martin, *The Refugee Act of 1980: Its Past and Future*, in MICHIGAN YEARBOOK OF INTERNATIONAL LEGAL STUDIES: TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 91, 92-96 (1982).

[32] It now provides: "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1) (1988).

[33] *See* 8 U.S.C. § 1158 (1988).

[34] *See id.; see also* 8 U.S.C. § 1101(a)(42) (1988) (for the new INA § 101(a)(42)(A)).

[35] *See id.*

Again Congress paid little attention to details of adjudication procedures or substantive standards,[38] but one theme is clear from

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[36] *See* 8 C.F.R. pts. 208, 209 (1989). The statute imposes an annual ceiling of 5000 on adjustments of asylees to permanent resident status. *See* 8 U.S.C. § 1159(b) (1988). This is a ceiling on adjustments only; it does not limit the number of people who may receive asylum in a given year. *See generally* Martin, *supra* note 31. Because asylum grants have run considerably above 5000 for the last several years, a backlog has developed and asylees must now wait much longer than one year before adjusting and thus receiving a "green card." *See December Visa Numbers Move Only Slightly*, 66 INTERPRETER RELEASES 1269-70 (1989).

[37] This statement must be qualified in one minor respect. The principal provision expressly meant for refugees from 1965 to 1980 was INA § 203(a)(7), 8 U.S.C. § 1153(a)(7) (1976). It allowed the use of six percent of the "preference" admission spaces each year for people who fled persecution in communist countries or the general area of the Middle East. The overwhelming majority of these refugee spaces (a total of 17,400 annually in the late 1970s) were used for overseas refugee programs, principally for the admission of Eastern Europeans selected in Western Europe, and in the late 1970s for Indochinese processed in Southeast Asia. *See* T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 620-23.

A statutory proviso to § 203(a)(7), however, permitted use of a portion of these admission spaces to grant permanent resident status to aliens who met the basic requirements but had been physically present in the United States for at least two years before applying for such adjustment of status. *See* 8 C.F.R. § 245.4 (1971). For example, a Polish national who overstayed a nonimmigrant visa could receive this status through a petitioning process carried out entirely in this country, if she proved the requisite two years' presence and flight from persecution. In a sense, she thus could be considered an asylee who graduated to full immigrant status under a permanent legislative provision. But the term "asylee" was never formally applied to the status of those who benefited from this proviso, and successful applicants moved directly to permanent resident status, usually from some sort of irregular status. Moreover, the qualifying standards departed somewhat from the provisions of the 1951 Convention (most graphically in the geographic limitations).

[38] Congress also applied the UN refugee definition to overseas refugee programs under INA § 207, 8 U.S.C. § 1157 (1988), which usually operate by way of INS interviews and screening in refugee facilities in third countries, such as Thailand or Austria. Because of this similarity in qualifying standards, one might assume that the system proposed here for asylum adjudications should therefore be applied to "refugee" adjudications in the overseas program. I would argue against such a conclusion. The widely different functional constraints operative in the overseas program counsel against identical determination systems.

First, simply because of physical location, the United States is able to apply numerous other screening criteria, as well as numerical ceilings, before deciding which refugees will be offered resettlement in the United States as part of the overseas programs. Historically, screening and selection for these programs have been based most importantly on these other criteria, such as family or other ties in the United States, rather than on satisfaction of the refugee definition. Therefore, pouring extensive resources into the adjudication of the latter issue often is not advisable. Second, in most such overseas circumstances, a decision to exclude certain applicants from the U.S. refugee program, on whatever grounds, does not necessarily mean return to their home country. Typically, such persons remain the

the legislative history. Congress intended the refugee standards to be applied neutrally and without ideological bias, in contrast to certain repealed refugee provisions that had made special provision for persons fleeing Communist countries.[39] Although occasional arguments have appeared, particularly during the Reagan Administration, for a more overtly political selection system,[40] neutral application represents by far the fairer and wiser policy. In the long run, favoring some groups in the asylum process only increases the political costs of returning other individuals, even when their claims are *accurately* rejected under an appropriately demanding application of the governing standards. Full consideration of this complicated

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responsibility of the first-asylum country, which may be able to find other resettlement opportunities for them.

The procedures suggested here are crafted for the sharper choices faced in U.S. asylum processing, wherein the government has essentially only two options once a person is adjudged a refugee, owing to the person's presence on U.S. territory and the usual unwillingness of third countries to contribute resettlement spaces: grant asylum (or at a minimum *nonrefoulement*) and allow indefinite stay here or deny protection and return the applicant to the home country. In that setting, greater assurance of accuracy and professionalism in applying the refugee definition is essential. I have elaborated on these distinctions in Martin, *supra* note 31, at 111-14.

[39] *See* Anker & Posner, *supra* note 31, at 12, 14-18, 41-43, 60, 64. Most of the congressional statements criticizing the earlier "discriminatory" provisions specifically addressed the overseas refugee program, because asylum provisions received little attention. There is no reason to doubt, however, that Congress expected the same neutral application in asylum processing, where the case for strict but evenhanded application of the refugee definition is probably far stronger. *See* Martin, *supra* note 31, at 113-14.

[40] In 1986, the Justice Department under Attorney General Meese was reportedly drafting new asylum regulations that would have established a presumption in favor of those fleeing "totalitarian" countries—apparently including all Communist countries. *See* Pear, *Plan to Give More Poles Asylum is Under Study by Administration*, N.Y. Times, Mar. 30, 1986, § 1, at 1, col. 4. No such regulations ever appeared. In 1987, Mr. Meese did announce a set of steps relating to Nicaraguans. Although she was under pressure from some conservative circles hostile to the Sandinista government to grant blanket permission to stay ("extended voluntary departure") to all Nicaraguans, her announcement nominally only restated established standards for ordinary asylum determinations. In practice, however, that statement encouraged more Nicaraguans to come forward and apply, and it has led to a far higher grant rate for Nicaraguans applying for asylum in INS district offices. Special review by the central office in Washington was also required before any Nicaraguan was deported. As a result, such deportations became extremely rare, even when asylum was denied. *See* REFUGEE REPORTS, July 10, 1987, at 7-8; REFUGEE REPORTS, Aug. 14, 1987, at 8-10.

For broader consideration of the merits of a more expressly political refugee program (arguments that carry more weight with respect to an overseas refugee program rather than an asylum system), see M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 49-50 (1983); Suhrke, *Global Refugee Movements and Strategies of Response*, in U.S. IMMIGRATION AND REFUGEE POLICY: GLOBAL AND DOMESTIC ISSUES 157, 157-62 (M. Kritz ed. 1983).

debate is beyond the scope of this study. Nevertheless, the study is premised on the assumption that Congress's 1980 approach is to be continued. It concentrates on finding effective ways to implement a neutral system meant to protect those most seriously at risk of persecution, whatever the political orientation of the home-country government.

In the early years of asylum adjudication under the Refugee Act, immigration authorities and refugee advocates alike assumed that the threshold standard for applying sections 208 and 243(h) was identical.[41] But the Act revived litigation over the precise understanding of that standard. The Board of Immigration Appeals (BIA), the body that hears appeals from immigration courts,[42] had traditionally required the applicant to show "a clear probability of persecution" in order to gain withholding of deportation under the pre-1980 version of § 243(h), whereas refugee advocates had consistently urged the adoption of some more generous standard.[43] When the Board declined to change its "clear probability" formula after enactment of the Refugee Act, numerous applicants challenged the rulings in the appellate courts.[44] The circuits divided on the question, and the issue reached the Supreme Court in 1984 in *INS v. Stevic.*[45] That Supreme Court ruling unexpectedly split the qualifying standards. It ruled that the Board's traditional "clear probability" test still governs in order to claim the mandatory protection of § 243(h), while hinting, without expressly ruling, that some easier standard might apply under § 208.[46] *Stevic,* however, did provide a softening gloss on the Board's "clear probability" test, reading it to require a showing only that persecution is "more likely than not."[47]

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[41] *See, e.g.,* Helton, INS v. Cardoza-Fonseca: *The Decision and its Implications,* 16 N.Y.U. Rev. L. & Soc. Change 35, 39 n.31 (1987-88); Scanlan, *supra* note 2, at 625.

[42] *See infra* notes 171-174 and accompanying text (discussing the Board of Immigration Appeals).

[43] *See, e.g.,* Rosa v. INS, 440 F.2d 100, 102 (1st Cir. 1971) ("The burden was . . . to prove that there is a clear probability that she will be subjected to persecution if deported."); Cheng Kai Fu v. INS, 386 F.2d 750, 753 (2d Cir. 1967) (stating that "only where there is a clear probability of persecution . . . is this discretion to be favorably exercised"), *cert. denied* 390 U.S. 1003 (1968); *In re* Dunar, 14 I. & N. Dec. 310, 318-19 (1973) (reaffirming "clear probability of persecution" standard after the U.S. became a party to the 1967 Protocol).

[44] *See, e.g., In re* McMullen, 17 I. & N. Dec. 542, 544 (1980) (reiterating the "clear probability of persecution" standard).

[45] 467 U.S. 407 (1984).

[46] *See id.* at 430.

[47] *Id.* at 429-30.

Three years later, in *INS v. Cardoza-Fonseca,*[48] the Court finally ruled squarely on the threshold standard determining eligibility for a discretionary grant of asylum under § 208. The majority overruled the BIA's continued assertion that the two standards remained identical, and forcefully stated that the § 208 test is more generous than the standard for § 243(h).[49] The Court declined, however, "to set forth a detailed description of how the well-founded fear test should be applied," leaving that term to acquire "concrete meaning through a process of case-by-case adjudication."[50] The § 208 test that has come to govern in the wake of *Cardoza-Fonseca* is most helpfully phrased as requiring "a reasonable possibility of persecution," or a showing of a "good reason to fear persecution"—but even these standards leave much leeway for application to the evidence presented in a particular case.[51]

These two Supreme Court cases bring curious results, to say the least. To my knowledge, no other country draws this sort of distinction between the substantive standards for determining refugee status, on the one hand, and *nonrefoulement* on the other.[52] Where there are distinctions, they typically run in the opposite direction: toward shielding *more* people against return, even if they do not strictly meet the refugee definition and will not be granted the full range of benefits that come with formal asylum.[53] Moreover, this American bifurcation is subject to substantial objection on policy grounds. It would permit American immigration authorities to deny asylum, perhaps quite frequently, in the exercise of discretion. Indeed, the Supreme Court in *Cardoza-Fonseca* went out of its way to emphasize that the Attorney General has discretion over these matters, and it plainly considered that the holding would increase her "flexibility" in responding to refugee crises.[54] Ostensibly this means that the Justice Department could even deport to their home country persons already judged to be "refugees" under the *Cardoza-Fonseca* standard, if they fall short of the showing required to claim the mandatory *nonrefoulement* protection, as interpreted in *Stevic.*[55]

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[48] 480 U.S. 421 (1987).

[49] *See id.* at 423-24.

[50] *Id.* at 448.

[51] *See In re* Mogharrabi, Interim Dec. No. 3028, slip op. (BIA June 12, 1987) (implementing the *Cardoza-Fonseca* ruling and spelling out new guidelines for asylum cases). Unfortunately, however, *Mogharrabi* followed the lead of a Fifth Circuit case, Guevara-Flores v. INS, 786 F.2d 1242 (5th Cir. 1986), and restated the standard as follows: "[A]n applicant for asylum has established a well-founded fear if she shows that a reasonable person in her circumstances would fear persecution." *Mogharrabi*, slip op. at 9.

This formulation is misleading and unhelpful. If there is any significant level of persecution in a country, a reasonable person would fear becoming its victim, simply because of residence in that society, even if the abuses, to date, have never been directed at her or persons like her. She may recognize that the chances of actually being persecuted are slim, but we surely would not count her out of the realm of reasonable persons if she harbors a fear of persecution. In short, a "reasonable person" would fear persecution well before the time when we would consider that the persecution has become a "reasonable possibility."

The Board continues to invoke the "reasonable person" standard but appears in practice to look for a "reasonable possibility of persecution"—a more objective inquiry—before granting asylum. It would promote greater candor in adjudication to revert to exclusive use of the "reasonable possibility" formulation, which is, after all, the precise wording used by the Supreme Court in dictum in *Stevic* and *Cardoza-Fonseca.*

[52] *See* Helton, *supra* note 41, at 39, 53.

To their genuine credit, the immigration authorities to date have avoided any such draconian use of the flexible discretion the Supreme Court ratified in *Cardoza-Fonseca.* The BIA has even moved, quite wisely, to limit discretionary denials of asylum and thus provide the more complete protection of asylee status for nearly all who meet the lower § 208 threshold.[56] As a result of this administrative practice, the only important test, in the vast majority of today's asylum cases, is the more generous § 208 standard, the "well-founded fear of persecution" test. If the alien meets this threshold qualification, and is also found worthy of the relief as a matter of discretion (as now usually happens), then there is no reason to consider the issues raised by § 243(h), because asylum status, by definition, carries with it protection against deportation or exclusion.[57]

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[53] *See, e.g.,* Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers,* 26 VA. J. INT'L L. 897, 900-02 (1986) (describing these practices).

[54] *See* 480 U.S. at 444-45, 449-50.

[55] These points are developed at greater length in T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 664-67; *id.* at 79-80 (Supp. 1987).

[56] *See, e.g. In re* Pula, Interim Dec. No. 3033, slip op. (BIA Sept. 22, 1987) (holding that in the absence of adverse factors, asylum should generally be granted in the exercise of discretion). For a comprehensive review of these issues, urging that discretionary denials of asylum be used rarely if the individual is found to be a refugee (an approach quite similar to that ultimately adopted in *Pula*), see Anker, *Discretionary Asylum: A Protection Remedy for Refugees under the Refugee Act of 1980,* 28 VA. J. INT'L L. 1 (1987). *See also* Anker & Blum, *New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in INS v. Cardoza-Fonseca,* 1 INT'L J. REFUGEE L. 67 (1989); Anker & McGrath, *The New Battleground of Asylum Eligibility,* in WORLD REFUGEE SURVEY—1988 IN REVIEW 29 (1989) (arguing that the BIA has begun to take a narrower view of what constitutes persecution and has thus made it more difficult for refugees from countries in the midst of civil war to gain refuge in the U.S.); Helton, *The Proper Role of Discretion in Political Asylum Determinations,* 22 SAN DIEGO L. REV. 999 (1985) (discussing the recent expansion of administrative discretion and limits, both domestic and international, on the exercise of that discretion).

[57] *See In re* Mogharrabi, Interim Dec. No. 3028, slip op. at 3 (BIA June 12, 1987).

Even if the bifurcation of standards someday becomes more important in the administrative scheme, it will have no significant bearing on the issues of procedural design considered in this study. As the Board has recognized, "the core of evidence and testimony presented in support of the asylum and withholding applications will in almost every case be virtually the same."[58] Consequently, the basic process of information gathering and evaluation will not differ, whatever the final calibration of the substantive legal standard. In principle, adjudicators must in either case first reach a judgment about the level of danger faced by the applicant in the home country. Only after making that combined factual and predictive assessment will they apply the respective legal test in order to determine whether to say yes or no to the application for the precise protection at issue. In what follows, therefore, reference to "asylum" determinations should be taken to encompass the adjudication process necessary to apply the *nonrefoulement* standards as well.

II. The Policy Context

A. *Angles of Vision*

1. The Asylum Tradition

The commitment to affording asylum to the persecuted is deeply rooted in American experience and tradition. The Statue of Liberty is a treasured icon, perhaps the purest single symbol, in a richly diverse nation, of our national self-identity. Furthermore, awareness of the grave consequences that may await a refugee wrongfully returned to the home country plainly deepens this commitment. No successful policy can ignore the instinctively favorable reaction that refugees evoke from the American public, politicians, and even (or especially) judges. Refugee advocacy groups know that they have a ready hold on public imagination, provided only that they can persuade their listeners that the objects of their advocacy are indeed refugees. This is as it should be. It is a proud tradition, one that should be preserved and strengthened.

Unfortunately, the very vigor of this tradition carries the seeds of difficulty once it is translated into administrative operation. As will be seen, accurate asylum determinations require the careful application of expertise to a body of information about the individual asylum seeker that is, at best, difficult to marshal. But few Americans think of this as a job for experts. Few are disposed to defer to the judgments of the agency primarily responsible for these decisions,[59] if the outcomes conflict with their own sense of obligation to America's heritage. This attitude accounts, perhaps, for the ambitious interventionist stance sometimes taken by judges,[60] and for the impulse toward sudden swings in policy that can come when a new set of executive branch officials becomes involved in the process.[61] It also means that debates on asylum issues often become bitterly polarized, for those who oppose deportation of unsuccessful asylum applicants often see the matter as a life-or-death issue.

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[58] *Id.* at 12.

These attitudes have an important operative significance for asylum adjudication reform. Any reforms seen as substantially more restrictive will face a heavy burden of proof in the public, the media, and Congress. Numerous earlier reform efforts have been defeated by resistance rallied in those forums by advocacy groups skillfully drawing on the Statue-of-Liberty tradition. If stalemate or retrenchment is to be avoided, reforms cannot be done on the cheap. They must include ample protections designed to win the support of relevant domestic audiences (including judges) by giving assurance that any new restrictions will not fall unjustly on deserving asylum seekers.

2. The Need for Control; Asylum as a Loophole

There is, however, another important angle of vision on the promise of asylum, and it prevails with some domestic constituencies. This outlook derives from the singular trumping power of a successful asylum claim. Such a claim overcomes virtually all the other qualifying requirements for immigration to the United States. It also moves the applicant to the head of the line for early permanent residence rights, even if she first established her presence in the territory in knowing violation of the regular provisions of the immigration laws. Viewed in narrow compass, this too is as it should be. Those who have been victimized by persecution should indeed receive, early on, a secure new status that will allow them to rebuild a new life in a new homeland, without undue insistence on the bureaucratic niceties of ordinary immigration law.

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[59] This reaction is no doubt fortified by the low esteem that immigration agencies usually enjoy within the bureaucratic hierarchy. *See* M. MORRIS, IMMIGRATION—THE BELEAGUERED BUREAUCRACY 87-94 (1985). Sometimes this attitude bursts forth in startling fashion. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 451-52 (1987) (Blackmun, J., concurring) (leveling harsh criticism at INS—the wrong agency (it was the BIA)—in an opinion that takes little account of the complexity of the issues at stake).

[60] *See, e.g.*, Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 455 (S.D. Fla. 1980), *modified sub nom.* Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982).

[61] For example, in her early months as Attorney General, Edwin Meese reportedly sought ways to change asylum policy and make asylum more nearly automatic for those fleeing Communist countries, as distinguished from those fleeing "authoritarian" countries. *See* N.L. ZUCKER & N.F. ZUCKER, THE GUARDED GATE: THE REALITY OF AMERICAN REFUGEE POLICY 143 (1987); *supra* note 40.

There are millions of people around the world, however, who face no substantial threat of persecution but who would value such a chance at permanent residence in a stable and wealthy nation.[62] In an apt simile, Michael Walzer has compared the affluent Western democracies to "élite universities, besieged by applicants."[63] Lacking family ties or scarce job skills, most of these "applicants" have no real prospect of success through any ordinary legal channel. It should not be surprising, then, that those who learn about the power of a claim to refugee status might choose to try their luck with an asylum application. After all, the only clear requisites for such a filing are physical presence on the soil of a Western democracy and persistence in asserting the claim. The potential is so promising that it has called into being a new class of entrepreneur "travel agents" who arrange for transportation and also instruct their clients on how to file for asylum once they encounter officials in the targeted Western country.[64] Seen in this light, asylum becomes a major loophole that gravely threatens the overall structure of deliberate control over immigration—control that is also highly valued by the public, and by politicians and judges.[65]

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[62] Lest this sentence be thought unduly ethnocentric or alarmist, one should add an important qualification. For most such people, their first choice would surely be to enjoy stability and prosperity at home, in a political and cultural environment with which they are familiar. Indeed, such attachments to home will doubtless always hold most of the population there, even if Western countries suddenly become much more hospitable to asylum claims. Alarmist cries suggesting that liberal asylum policies may cause whole countries to empty out into a migrant stream to the North are thus clearly exaggerated. *Cf.* Rudge, *Don't Blame the Victim,* WORLD LINK, May 1988, at 68 (warning against "the apocalyptic scenario suggesting the whole world plans to seek asylum" in the West). But, given that stability and prosperity are not realistic medium-term prospects in many developing nations, it is quite natural that some proportion of the population will begin looking elsewhere. And even if the proportion is low relative to total home-country population, the absolute numbers of migrants can become sufficiently high to pose a major political problem in the receiving state.

[63] *See* M. WALZER, *supra* note 40, at 32.

[64] *See, e.g.*, E. RATUSHNY, A NEW REFUGEE STATUS DETERMINATION PROCESS FOR CANADA 20 (1984) (a report to the Minister of Employment and Immigration, noting reports of such agents making arrangements for "multiple claimants who have read in local newspapers of the ease of claiming refugee status in Canada"); Arbenz & Zürcher, *The Co-ordination of the Asylum Policies of the European States, in* THE LAW OF ASYLUM AND REFUGEES: PRESENT TENDENCIES AND FUTURE PERSPECTIVES 126, 127 (Council of Europe 1987) (reporting on travel agents taking asylum seekers to

Two public values, not often well articulated or conscious, but nonetheless strongly held, thus come into conflict in the asylum program.[66] On the one hand stands the promise of refuge to the persecuted, on the other the demand for reasonable assurance of national control over the entry of aliens. If events force confrontation and a stark choice between the two, it seems likely as a matter of practical politics that the control principle would win over the refuge principle.[67] Refugee advocates should take this danger to heart since they have a major stake in minimizing the tension between the two goals by helping to structure a workable and reassuring asylum system. As a former UN Deputy High Commissioner, Richard Smyser, recently observed in a perceptive book: "The public will not allow govern-

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Europe in the guise of tourists); Teitelbaum, *Political Asylum in Theory and Practice*, 76 PUB. INT. 74, 79 (1984); *Welcome and Goodbye*, ECONOMIST, Jan. 7, 1989, at 35; Applebome, *Rings Smuggling U.S. Aliens Gain Sophistication*, N.Y. Times, Mar. 2, 1989, at A23, col. 1. Most officials and a few private attorneys interviewed for this study also had tales about the schemes carried out by arrangers or organizers.

[65] *See, e.g.*, Jean v. Nelson, 727 F.2d 957, 975 (11th Cir. 1984) (expressing concern that plaintiff's position "would ultimately result in our losing control over our borders"), *modified*, 472 U.S. 846 (1985); T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 723 (quoting Attorney General Smith as stating that we, as a nation, had "lost control of our borders"); *Public-Opinion Poll Reveals Support for Border Security*, IMMIGR. POL. & L., Apr. 20, 1989, at 5; *see also* Reitz, *The Institutional Structure of Immigration as a Determinant of Inter-Racial Competition: A Comparison of Britain and Canada*, 22 INT'L MIGRATION REV. 117, 131 (1988) (discussing the importance of sustaining public perception of control over immigration).

[66] *See* E. HARWOOD, IN LIBERTY'S SHADOW: ILLEGAL ALIENS AND IMMIGRATION LAW ENFORCEMENT 10-15 (1986) (poll findings reflecting ambivalence on the part of Americans regarding immigration control); Pear, *New Restrictions on Immigration Gain Public Support, Poll Shows*, N.Y. Times, July 1, 1986, at A1, col. 5 (reporting polls indicating "that Americans have contradictory, ambivalent feelings about immigration"). Even more debilitating, each of the respective attitudes is likely to prevail at different points in the policy process: Restrictionism in the early stages of a perceived massive influx can be replaced by doubt and generosity as the time nears for placing identifiable individuals on a plane home. This is a recipe for stalemate. *See* Martin, *supra* note 1, at 12-13.

[67] In 1986, for example, the Swiss Parliament modified its law on asylum in response to the substantial increases in asylum applications that country was experiencing. In addition to enacting various procedural changes, Parliament made it easier for the Federal Council to derogate from the ordinary statutory guarantees of asylum. Theretofore such derogation was permissible only in times of armed conflict; since the 1986 law, derogation is also authorized in peacetime when there is an "extraordinary" influx of asylum seekers. *See* Loi sur l'asile du 5 octobre 1979, Recueil officiel des lois et ordonnances de la Confédération suisse [RO] 1980 at 1717, *amended* Modification du 20 juin 1986, art. 9(1), RO 1987 at 1674 (codified at Recueil systematique du droit fédéral [RS] 142.31).

ments to be generous if it believes they have lost control."[68] Asylum will always be an inherently unruly component in an immigration system that usually functions with tidy categories and elaborate advance screening. But its unruliness can be curbed, and public support thereby increased, if we can create a system capable of saying "no" to the unqualified—fairly, but firmly and expeditiously—while promptly welcoming the meritorious applicant.[69]

B. *Factual Issues*

In principle, it should be possible to distinguish between genuine refugees and those who do not qualify, thereby both honoring the asylum tradition and closing the loophole to those whose claims are meritless. But, for several important reasons, that task is far more difficult than it might initially appear.

1. Lack of Clarity Concerning the Substantive Legal Standard

Although Americans (along with most of the Western world) are virtually united in a commitment to protect refugees, they are far from united in a common conception of "refugee." Everyday parlance tends to treat anyone fleeing life-threatening conditions as a refugee, whether the source of the threat be natural disaster, foreign invasion, civil unrest, or deliberate persecution.[70] The legal framework employs a narrower concept than this journalistic usage, and the 1951 Convention definition might be expected to provide the basis for a unified common understanding, built around the phrase "well-founded fear of persecution." But this phrase can also take on a variety of shapes, from highly expansive to narrowly crabbed, often depending, it seems, on whether the speaker wishes to include or exclude a particular group of claimants.[71]

One common mistake, made by both the left and the right, is to assume that the existence of serious human rights problems in a country should translate into a finding that virtually all emigrés from that country are refugees.[72] Indeed, the language of the 1951 Convention can be made to fit this conception: If persecution occurs in the home country, any expatriate's claimed fear of it upon return is well-founded. The fear is not fanciful; it is based upon proven fact. If the legal standards conformed to this conception, adjudication would be greatly simplified, for it could then be based on sweeping categorical judgments that would be easy to pronounce and administer.

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[68] W. SMYSER, *supra* note 20, at 119.

[69] *See also* THE SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST: FINAL REPORT 165 (1981) [hereinafter SELECT COMMISSION] (reaching similar conclusions).

[70] *See generally* Shacknove, *Who is a Refugee?*, 95 ETHICS 274 (1985) (discussing the various conceptions of "refugee" held by society and selected international organizations).

[71] *See* C. KEELY, GLOBAL REFUGEE POLICY: THE CASE FOR A DEVELOPMENT-ORIENTED STRATEGY 6-11 (1981).

The case law makes clear, however, that the "well-founded fear" standard sets a higher threshold and ordinarily requires a far more individualized inquiry.[73] Partisans in the debate over legal doctrine usually accept this narrowing gloss,[74] even if it does not always penetrate into public debate on the issue. Because legal standards demand individualized scrutiny, adjudication obviously requires a more sophisticated and difficult factual inquiry. The inquiry must first strive to assure the marshalling of all accessible information that might bear on the individual's circumstances and the conditions of the country. But just gathering that information is not sufficient, for in this contentious sphere, both governments and exiles may have significant reasons to distort their accounts of the facts or manufacture them from whole cloth. Crucially, asylum adjudication must therefore include the capacity to evaluate the assembled information in order to decide which is trustworthy and which is doubtful. Adjudicators must have the authority, and the confidence, simply to reject some of the information tendered to them.

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[72] Such a reading underlies oft-heard complaints that our asylum policy is "out of sync" with our human rights policy, or more broadly, with our foreign policy. *See, e.g.*, Dreifus, *No Refugees Need Apply*, ATLANTIC, Feb. 1987, at 32, 35 (quoting INS General Counsel Inman to this effect); Pear, *supra* note 40 (quoting an unnamed Reagan Administration official stating that deporting Nicaraguans was inconsistent with the lobbying effort to win support for the contras); Hansen, *No Way to Treat Solidarity Refugees*, N.Y. Times, Apr. 1, 1985, at A21, col. 1 (arguing that INS denials of asylum to Poles undercut the credibility of our foreign policy).

[73] *See, e.g.*, Vilorio-Lopez v. INS, 852 F.2d 1137, 1141 (9th Cir. 1988) (holding that there must be "'specific evidence . . . to support the alien's claim that persecution likely would be directed toward her as an individual'" (quoting Platero-Cortez v. INS, 804 F.2d 1127, 1130 (9th Cir. 1986))); Cardoza-Fonseca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd*, 480 U.S. 421 (1987); Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984) (holding that an applicant must "present *specific* facts establishing that she or she has actually been the victim of persecution or has some other good reason to fear that she or she will be *singled out* for persecution . . ."); *In re* Mogharrabi, Interim Dec. No. 3028, slip op. at 4 (BIA June 12, 1987) ("It is clear that to a large degree the meaning of 'well-founded fear' can in fact only be determined in the contexts of individual cases").

[74] Some authors argue that protection of a wider range of endangered asylum seekers, such as those fleeing civil war, is now required as a matter of customary international law. *See, e.g.*, Goodwin-Gill, *supra* note 53, at 902 (1986) (arguing that customary international law incorporates this mandate as a component of *nonrefoulement*); Perluss & Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551, 554-55 (1986) (arguing on the basis of an alleged "customary norm of temporary refuge"); *see also* Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, June 20, 1974, art. 1, 1001 U.N.T.S. 46, 47 (This treaty's definition of "refugee" includes those covered by the definition of the 1951 Convention definition as well as those who flee "external aggression, occupation, foreign domination or events seriously disturbing public order"). But these authors generally do not dispute the conclusion stated in the text concerning the application of the 1951 Convention definition. *See* Hailbronner, Nonrefoulement *and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, 26 VA. J. INT'L L. 857, 880-87 (1986) (arguing that even states with expansive refugee policies have not surrendered the discretion to retreat to the narrower 1951 Convention standards). For a brief discussion of American practice in this regard, using the device of "extended voluntary departure," see *supra* note 18.

The legal standards thus require that applicants show something more than simply that human rights abuses occur in the home country.[75] That "something more" is usually understood as a showing that the applicant is likely to be targeted by the persecutors upon return. Even after the Supreme Court's *Cardoza-Fonseca* decision, there remains considerable room for dispute over just how much more of a showing this entails. Must the claimant show she would be "singled out" by the persecutors? How sharply focused must the threat be? What is relevant and probative evidence of such a threat? Must the applicant's testimony be corroborated? And further, what exactly is "persecution"? Is sustained discrimination sufficient, or is something more such as a threat to life or freedom required?[76]

These disputes continue in the literature, in public debate, and in American and foreign case law. Although some progress has been made in refining the standards and achieving a more unified conception, large differences of view abide. Ideally, the Board of Immigration Appeals, the principal specialized custodian of legal doctrine in this field, would develop a body of doctrine that would refine and unify the understandings of the standard. The Board, however, has had difficulty playing this role, in part because it receives little deference from the reviewing courts in this field. Hence, splits among the circuits develop and persist,[77] and the Supreme Court is not in a position to resolve more than a handful of such disputes.

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[75] *See, e.g.*, Martinez Romero v. INS, 692 F.2d 595, 595-96 (9th Cir. 1982) (holding that the reported anarchy in El Salvador, without other special circumstances, is insufficient to preclude return of an alien to that country by the INS).

[76] For a thorough exploration of the case law on these issues, see Blum, *The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980*, 23 San Diego L. Rev. 327 (1986).

2. The Coast of Bohemia

Compounding this substantive legal problem are the images we (both citizens and government officials) bring to judgments about asylum policy. The legal standard looks, in most cases, toward a finely calibrated individualized judgment of the risk of persecution the applicant would face in the homeland. The judgment must be based, to some extent, on general information about human rights conditions in the home country. The primary reliance, however, will fall, most of the time, on information specific to that individual.[78]

Public debate on asylum policy, however, proceeds in cruder terms. Partisans are often ready to make sweeping judgments, by nationality, about the merit of large groups of asylum seekers. Two leading schools of thought have been prominent in the debate. The first, which has long dominated actual outcomes, assumes that virtually anyone from a Communist country would face persecution upon return. Holders of this view find it nearly unthinkable that the government could contemplate deportation.[79] A second school makes similar assumptions about Central American countries, particularly El Salvador and Guatemala.[80]

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[77] For example, there is currently a circuit split as to the meaning of persecution on account of a political opinion. *Compare* Campos-Guardado v. INS, 809 F.2d 285, 289 (5th Cir.) (requiring personally-held political opinion to qualify for asylum), *cert. denied*, 484 U.S. 826 (1987) *with* Lazo-Majano v. INS, 813 F.2d 1432, 1435 (9th Cir. 1987) (allowing personal reasons to qualify the applicant for asylum). There is also a split as to under what circumstances threats by guerrillas are sufficient to establish a "well-founded" fear. *Compare* Arteaga v. INS, 836 F.2d 1227, 1233 (9th Cir. 1988) (finding well-founded fear) *with* Rodriguez-Rivera v. INS, 848 F.2d 998, 1006 (9th Cir. 1988) (failing to find a well-founded fear).

[78] This statement must be qualified when the asylum claim is based on group characteristics, such as persecution directed at all members of a religious minority, or perhaps persecution that is so indiscriminate that virtually all who manage to escape should be recognized as refugees (I have in mind Pol Pot's Cambodia). For a helpful rethinking of definitional issues, see A. ZOLBERG, A. SUHRKE, & S. AGUAYO, ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD 25-33, 269-75 (1989). The authors break down the sociological concept of refugees into three subgroups: (1) activists, whose political actions draw the wrath of the government; (2) targets, whose group affiliation (ethnicity, race, religion) is the reason for their oppression; and (3) victims, who are caught in a civil war's crossfire or are exposed to generalized social violence. *See id.* Only the first two readily fit into the legal definition derived from the 1951 Convention.

[79] *See, e.g.*, Pear, *supra* note 40 (reporting that rules being considered by the Reagan Administration "would establish a presumption that aliens fleeing [communist] countries had 'a well founded fear of persecution' and therefore met the statutory standard for obtaining asylum in this country"); Hansen, *supra* note 72 (suggesting that virtually all Polish nationals should qualify for asylum).

a. *The Essential Problem*

This kind of stereotyping or oversimplification is unfortunately commonplace—and to a significant extent inevitable—in public debate and policy decisions. In a classic work, Walter Lippmann explored comprehensively the influence on policy of these "pictures in our heads."[81] In explaining how easily policymakers can err by relying on their own misconceptions about foreign lands, she wrote:

> [T]he real environment is altogether too big, too complex, and too fleeting for direct acquaintance. We are not equipped to deal with so much subtlety, so much variety, so many permutations and combinations. And although we have to act in that environment, we have to reconstruct it on a simpler model before we can manage with it. To traverse the world men must have maps of the world. Their persistent difficulty is to secure maps on which their own need, or someone else's need, has not sketched in the coast of Bohemia.[82]

The "coast of Bohemia" problem bedevils both public debate and adjudication in the asylum field.[83] But perhaps the image for our purposes should be shifted from the littoral to the physiographical. Few nations enjoy a political geography characterized by a reliably fertile plain of steady human rights observance. Outcroppings of abuses appear, sometimes intermittent hills, sometimes whole mountain ranges of severe persecution. The partisans in refugee debates—as well as adjudicators and judges under the current system—are too often inclined, in looking at nations to which they are favorably disposed, to mistake mountains for hills—or plains. The same people, in looking at nations to which they are hostile or for whose exiles they have (understandably) developed sympathy, often picture mountains where they should see hills, and then rush to the conclusion that the nation's exiles are refugees. Whatever the actual geography, it is also easy to forget that many people in those distant nations continue to inhabit the valleys even when the mountains loom large and forbidding.

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[80] *See, e.g.*, Barker, *New Wave of Salvadoran Immigrants Revives Call for Refugee Status*, Wash. Post, Feb. 18, 1989, at B3, col. 1. (indicating that the flood of refugees is caused by human rights violations).

[81] W. LIPPMANN, PUBLIC OPINION 3 (1960).

[82] *Id.* at 16. For those who are rusty on their Eastern European geography, Bohemia is located in Western Czechoslovakia. It has no coast.

[83] The problem has been noted in a few cases, although not in these terms. *See, e.g.*, Perez-Alvarez v. INS, 857 F.2d 23, 24 (1st Cir. 1988) (quoting from dissenting opinion of BIA Member Heilman, warning immigration judges against "assumptions regarding the way other societies operate," for they are often "proven to be totally wrong" upon a full hearing); Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1496-97 (C.D. Cal. 1988) (finding that "impressions of INS agents and officials that Salvadorans come to the United States solely for economic gain" created barriers to the development of full and accurate information).

b. *Boxes vs. Spectrums*

A related and persistent misunderstanding compounds the difficulties in achieving a sensible and widely supported asylum policy, and also occasionally complicates adjudication. Much of the debate proceeds as though there are two sharply different categories of persons who find their way into the asylum adjudication system in this country: refugees, on the one hand, and economic migrants (or simply "illegal aliens") on the other. A recent book on U.S. refugee policy (in other respects quite thorough and insightful) reflects this attitude:

> Refugees are neither immigrants nor illegal migrants, although, like immigrants, they have forsaken their homelands for new countries and, like illegal migrants, they may enter those new countries without permission. But a refugee is, in the end, *unlike either*. Both the immigrant and the illegal migrant are drawn to a country. *The refugee is not drawn but driven;* often, he seeks not to better her life but to rebuild it, to regain some part of what she has lost.[84]

Even if this sharply dichotomous view might, at one time, have captured the realities of refugee flows, it does not offer a helpful approach to today's asylum caseload. Today's dilemma is both tragic and surpassingly difficult precisely because, among current asylum applicants, refugees are so much like illegal migrants. Only an indistinct and difficult line separates those who should succeed on their asylum applications from those who should not. That is, most of those applying in the United States today were both drawn and driven, and they chose to come in response to a complex mix of political and economic considerations. Asylum seekers are not so different from the rest of us. We have a hard time deciding, particularly when we make difficult, life-altering decisions, and when we finally do choose a course of action, we act from a mix of motives.

Take the case of a hypothetical Haitian farmer. For years she has been anguished by the unbridled power that local officials, supported by militia units or bands of thugs, wield in the community. She knows of occasions on which they have terrorized those who resist their decrees, by burning a hut or killing a farm animal. But she also realizes that most people, who remain quiet, pay an occasional tribute, and raise no opposition, will be left alone. She endures this situation for many years, although she is more vocal than most of her neighbors about the community's problems. One year, her meager corn crop fails owing to the worst drought of the decade. She worries how she will feed her children, already showing initial signs of malnutrition. Shortly thereafter, she learns from friends about a boat that is about to depart for Miami, where, it is said, jobs are available and each day's pay exceeds a month's earnings in Haiti. They urge her to come along.

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[84] N.L. Zucker & N.F. Zucker, *supra* note 61, at xiv (emphasis added).

The choice is not an easy one. She consults with her family, and they talk about the crop failure and the political miseries of the region. They discuss the pain that would come from lengthy separation. They wonder whether the stories can be true about the jobs in Miami. Then they learn of a new episode of retribution visited on a farmer in a nearby valley, who apparently ran afoul of the local hierarchy and was left maimed by a nighttime attack. Some family members believe that this episode presages another serious outbreak of official violence; others think it is isolated and that things will quiet down as before. Pondering all of these factors, at first, she is sure she will stay. Then, after a child endures a week of persistent illness, she decides that she should leave, in an effort to earn enough to pay for medical care and food for her offspring. The family ultimately concurs, even though it means scraping together nearly all their savings to meet the boat captain's fee for the journey. No thought is given to moving the whole family; they could not possibly afford the captain's charge.

Once this person arrives in Miami, should she be seen as a "drawn" economic migrant or a "driven" refugee? She did not lack choice. Although many considerations strongly pointed toward leaving, she weighed a variety of difficult factors and chose at this time to travel to Miami. She could have stayed and remained subject to the same range of political and economic risks, uncertainties, and privations. In fact, she was both drawn and driven, and the factors she considered were both economic and political.[85] Does the presence of economic considerations undercut her refugee claim? Or should we try to assess which was her primary or dominant motivation for leaving?[86] Or perhaps adjudication might center on the fact that the need to earn money for medical care—an economic consideration—was the immediately precipitating factor.

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[85] Further evidence of the mix of motives appears, for example, in an extensive survey relating to Salvadorans in the United States. *See* S. MONTES MOZO & J.

Each of the perspectives implicitly underlying these questions is misleading. We do not need to find that she was only driven, nor assess what her primary motivation was, nor the immediately precipitating event. The best way to understand asylum adjudication is to focus on the degree of risk she would face when she returns. If the risk of persecution is sufficiently substantial, her fear is well-founded, even if it was her need for funds to feed her children that sent her on the particular boat trip at the particular time. That she stayed home until economic considerations tipped the balance in her decision may be relevant—but only for the light it casts on the separate question concerning the degree of risk she truly faces. Her refugee claim is not forever tainted because she thought about jobs in Miami or the need for money to feed her family.[87] Indeed, this would be abundantly clear if one could establish that shortly after her departure, which was precipitated, let us stipulate, by economic concerns, the local authorities expanded their violent suppression and actually began killing or jailing anyone who had ever publicly opposed the government or the local leaders.

The 1951 Convention definition best translates into workable adjudicative guidance only in this light. It does not ask how much of a role economics played in the decision to leave; it asks about risk levels upon return. The economic migrant/political refugee distinction, however phrased, is misleading and unnecessary.[88]

Vasquez, Salvadoran Migration to the United States: An Exploratory Study 11-14 (1988) (28.5 percent of Salvadorans surveyed said they emigrated exclusively for political reasons; 20.6 percent claimed both political and economic reasons; apparently the rest spoke only of economic or other nonpolitical reasons).

[86] *See* Anker & Posner, *supra* note 31, at 68 (suggesting—erroneously, in my view—that the applicant is a "refugee only if his 'primary motivation' is political").

[87] *See* United States v. Santos-Vanegas, 878 F.2d 247, 252 (8th Cir. 1989).

[88] The majority opinion in *Cardoza-Fonseca* states that the definition "makes the eligibility determination turn to some extent on the subjective mental state of the alien," and it later refers to "the obvious focus on the individual's subjective beliefs." INS v. Cardoza-Fonseca, 480 U.S. 421, 430-31 (1987). Other commentary on the 1951 Convention also claims equal status for "subjective" factors. *See* Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 11-12 (1979)[hereinafter UNHCR Handbook]. But no asylum adjudication system visited in the course of this study devotes any significant resources to inquiries into the applicant's subjective state of mind; the fact of application for asylum is taken as sufficient indication that the

If all asylum applicants did fit neatly into one of two boxes—refugee or economic migrant—the adjudicative task would certainly be simplified. The job would simply be to unmask the impostors, those economic migrants who are base enough to pose as something they are not. Unfortunately, some people with authority over asylum decisions in Western countries sometimes speak of adjudications as though they did present such a morality play. They hasten to label as abusive, frivolous, or lawless those claims that simply fall short of the necessary showing.[89]

But the world is not that simple. Asylum adjudication, it must be recognized, is at best a crude and incomplete way to respond to the complex realities that the world presents.[90] Our legal structure, for ultimately sound reasons, demands a simple yes or no answer to the asylum claim. But the dichotomous character of the results should not obscure the complexity onto which that yes-or-no grid is forced. Asylum seekers present a spectrum of situations, with only subtle shadings distinguishing the risk levels they face.[91] Adjudication must draw a line at some point on that spectrum. Furthermore, it must do so with care, so that it protects those whose risks exceed the threshold, even if they happen to have joined a migration stream

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applicant holds a subjective fear of return. Moreover, the central holding of *Cardoza-Fonseca* clearly contemplates primary inquiry into the probability of persecution—an objective determination. *See* Gibney, *A "Well-Founded Fear" of Persecution,* 10 HUMAN RTS. Q. 109, 110 (1988). A British court's effort to import a greater role for subjective fears (even if they could be shown objectively to be exaggerated) was overruled by the House of Lords in R. v. Sec'y of State for the Home Dept. *ex parte* Sivakumaran, 1 All E.R. 193 (H.L. 1988).

[89] For example, in a 1988 article, the then Minister of the Interior for the Federal Republic of Germany noted that only 9.3% of asylum seekers in 1987 were recognized as refugees. She then commented: "This implies that 90.7% of all those seeking asylum in West Germany *unlawfully claimed* to be politically persecuted." Zimmermann, *View From West Germany,* WORLD LINK, May 1988, at 65 (emphasis added); *see, also INS Responds to Central American Influx,* 65 INTERPRETER RELEASES 1311-1312 (1988) (comments by INS Commissioner Nelson suggesting that unsuccessful asylum claims are "abusive"). A perceptive critique of such attitudes appears in Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States,* 17 U. MICH. J.L. REF. 183, 191-93 (1984).

[90] A pithy and revealing illustration of these complications, and of the effect of the pictures inside immigration judges' heads, appears in Neier, *Closing Remarks,* 16 N.Y.U. REV. L. & SOC. CHANGE 157 (1987-88) (recounting experiences of the author, vice-chairman of Americas Watch, as an expert witness in asylum cases in which similar home-country consequences were seen as economic phenomena in Central America and political phenomena in Eastern Europe).

[91] *See* N.L. ZUCKER & N.F. ZUCKER, *supra* note 61, at 149 (recognizing this feature of much of refugee migration).

made up principally of those less severely threatened, who therefore lack, in this technical sense, a well-founded fear of persecution.

c. *Lessons*

These observations suggest two lessons with respect to asylum. The first focuses on the nature of public debate. Every effort should be made to avoid the use of dichotomous images and to break the ready links people rush to forge between human rights policy and asylum determinations. Obviously, an important relationship exists between human rights abuses in the home country and the merits of asylum claims by that country's nationals. But it is hardly a one-to-one correlation. Returning a high percentage of asylum seekers to a certain country is not necessarily inconsistent with a vigorous human rights diplomacy. Return pronounces no blessing on the home government's overall practices; it simply indicates that these particular applicants did not make the requisite showing of the risk of persecution. Similarly, granting asylum is not inconsistent with a policy of alliance and support for a democratically elected government. Many such regimes, particularly when newly installed, are only beginning a difficult process of curbing human rights abuses committed by the military, the police, or nongovernmental factions. We can support these efforts while still shielding the truly jeopardized targets of those incompletely controlled elements.

Second, and more important for the immediate object of this study, the adjudication process must be shaped with attention to the "coast of Bohemia" problem. Asylum adjudicators are given an extremely difficult job, particularly in light of the inaccessibility of the facts they must develop, the potential consequences of their judgments, and the public ambivalence concerning their task. No wonder they may be tempted to retreat into categorical images about safety and danger in foreign countries that will make the sorting process easier.[92] Asylum reforms must therefore make allowance for this phenomenon and afford every opportunity, through initial training, continuous supply of reliable information, and well-crafted monitoring, for a redrawing of the pictures inside the adjudicators' heads to conform more closely to the reality of political life in the home countries.

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[92] *See* W. Lippmann, *supra* note 81, at 73-74.

3. Limited Accessibility of the Facts on Which to Base an Adjudication

Little has been done to analyze carefully the various elements that go into the difficult determination of whether an asylum seeker has a well-founded fear of persecution, but such analysis is integral to designing an effective adjudication structure. In rough fashion, the determination may be broken down into three parts: (1) classical retrospective factfinding about past events specific to the claimant—adjudicative facts, in the terminology of Professor Kenneth Culp Davis;[93] (2) broader determinations about the practices of the government or other alleged persecutors in the home country (often referred to as "country conditions")—legislative facts; and finally (3) an informed prediction (not truly a finding)[94] about the degree and type of danger the particular applicant is likely to face upon return. This last element is actually a prediction based on a combination of the first two elements. These are not three separate steps performed sequentially. They are closely interwoven, and it will appear that acquaintance with the second element is especially helpful in performing the first task effectively. Each step presents unique challenges, unlike those faced in other administrative adjudications. Indeed, of all such adjudications, asylum may rest on uniquely elusive factual foundations.

a. *Adjudicative Facts*

To begin with, applicants typically base their claims on events in a distant land about which the U.S. government may have no independent information—matters such as their own past political activities, or specific abuses or threats directed at them or their families and friends. Of course, it is theoretically possible for the government to develop more information in an individual case, particularly once the applicant provides details, by assigning diplomatic personnel posted to that country to investigate. But sheer expense precludes such an effort except in a handful of cases, and the State Department freely admits that it rarely resorts to field checking. Such checking makes sense only where the information is likely to be reasonably accessible: for example, when it involves a well-known figure or relates to a large-scale event, such as a claimed political demonstration in the capital city, which can be readily confirmed or disproved. Moreover, even if the U.S. government would decide to dedicate greater resources to investigating more such cases, the investigations might yield little reliable information. If an ongoing threat of persecution truly exists, persons interviewed in the home country can hardly be expected to speak with candor to an unknown foreigner about such sensitive and dangerous matters.

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[93] *See* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.2, at 138-42 (2d ed. 1980); Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942). This framework has been criticized, particularly because in some circumstances it may be difficult to tell whether specific matters constitute adjudicative or legislative facts. *See, e.g.*, Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 536-37 (1970). Nevertheless, the distinction is sufficiently crisp to be quite illuminating in this setting. Judge Friendly used Davis's framework to make sense of the asylum adjudication process, and also to set forth limits on the appropriate use of State Department information in Zamora v. INS, 534 F.2d 1055, 1062-63 (2d Cir. 1976).

[94] *See* Washington Post Co. v. United States Dept. of State, 840 F.2d 26, 40-41 (D.C. Cir. 1988) (Bork, J., dissenting).

In short, even the straightforward retrospective factfinding involved in asylum determinations is difficult to accomplish. Bona fide applicants are unlikely to have left their homelands with corroborating documentation or with eyewitnesses to critical events. On the other hand, fraudulent applicants can probably count on the government's inability to produce evidence disproving their stories.[95]

Asylum determinations thus often depend critically on a determination of the credibility of the applicant, for she will usually be the only available witness to the critical adjudicative facts of the case.[96] Because that person also has substantial incentives to lie or to embroider the truth (and few disincentives),[97] this makes for a system vulnerable to manipulation. I was struck, however, by the frequent comments from several participants I interviewed, particularly government decisionmakers and INS trial attorneys, indicating that the asylum system is saved from complete collapse largely by the admirable honesty of most of the applicants.

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[95] At one time, administrators and courts tended to react to this problem with a dogmatic insistence on detailed corroboration of the applicant's claims. *See* Nasser v. INS, 744 F.2d 542, 544 (6th Cir. 1984); Shoaee v. INS, 704 F.2d 1079, 1084 (9th Cir. 1983); Kashani v. INS, 547 F.2d 376, 379-80 (7th Cir. 1977). Wisely, most U.S. authorities now recognize that the individual's own account may be the only available evidence regarding her own situation and that it should be accepted if reasonably detailed and consistent. *See, e.g.*, Cardoza-Fonseca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd*, 480 U.S. 421 (1987); Ananeh-Firempong v. INS, 766 F.2d 621, 628 (1st Cir. 1985); Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984); *In re* Mogharrabi, Interim Dec. No. 3028, slip op. at 10 (BIA June 12, 1987) (stating that often the only evidence available is the applicant's own testimony, which is to be credited if it is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for her fear").

[96] *See generally* Watkins, *Credibility Findings in Deportation Proceedings: "Bear[ing] Witness Unto the Truth,"* 2 GEO. IMMIGR. L.J. 231 (1987) (the author is an immigration judge in San Diego).

[97] In principle those who falsify their applications are subject to criminal prosecution under statutes punishing false statements. But the inaccessibility of the factual information obviously makes proof of knowing falsehood quite difficult, and

Again and again in the course of the interviews carried out for this study, participants in the process, on all sides of the issue, emphasized one fact: In the vast majority of cases, the only useful detailed evidence respecting adjudicative facts comes from the mouth of the applicant. This feature must therefore figure prominently in any serious effort at procedural and structural reform. The system must be designed to mine as much useful information as possible from the limited vein provided by the applicant's own testimony and her availability for questioning during any interview or hearing.[98]

b. *Legislative Facts*

The second critical element of factfinding requires determinations about broader patterns of governmental behavior in the home country. For example, the asylum applicant may prove to the factfinder's satisfaction, through her own detailed testimony, that she was active as a union organizer for two years before leaving for the United States and that she heard stories of arrests of organizers in nearby towns before she left. But in order to assess the risk that the individual would face on return, the adjudicator must also learn from some source about relevant legislative facts. Does the government regard union organizers as opponents, subject to suppression? If so, what forms does the suppression take? Loss of a job or limitation of schooling options for organizers' children might not amount to persecution (even though it would constitute a human rights violation), but beatings, jailings, or killings in reprisal for peaceful union activity certainly would. If there have been some reports of such violence, how widespread are the abuses? Were they based on the victim's union affiliation or on some other characteristic? In other words, is the current applicant relevantly similar to other persecution

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prosecutions are rarely, if ever, brought. The only sanction, then, is expulsion from the country following denial of the asylum claim—the same consequence faced if asylum had never been sought.

[98] The BIA in essence recognized the importance of this process in a recent precedent decision that requires the asylum applicant to testify under oath at the hearing before the immigration judge; she cannot simply rest on the papers presented. *See In re* Fefe, Interim Dec. No. 3121, slip op. (BIA Aug. 1, 1989).

victims? And has there been a material change in the country since those events, such as a complete revamping of the police forces responsible for the earlier abuses, including reliable disciplining of the violators?

Each of these questions will be difficult to answer, both because such patterns change over time, sometimes quite quickly, and because persecutors do not spell out the range of characteristics they seek in their victims. If the available information shows any substantial level of persecution of union activists, then uncertainties should be resolved in the individual's favor. Thus, the claimant should receive the "benefit of the doubt" commonly prescribed in works on refugee law.[99] But the benefit of the doubt is hardly a magic formula, somehow dispensing with a need to reach a judgment about country conditions.[100]

The individual applicant will not necessarily be in a position to provide insight on these wider matters, although the process should certainly allow for whatever assistance she or her counsel can provide. Most Western countries therefore support their adjudicators with well-supplied documentation centers staffed by professionals in information science. Fortunately, the last twenty years have seen a welcome proliferation of human rights reporting, both by governments[101] and private human rights organizations,[102] as well as increasingly sophisticated efforts to systematize the information-gathering process and facilitate sharing.[103] To minimize distortions in decisions about country conditions wrought by the needs of diplomacy, many countries assure clear separation of adjudicators from their foreign ministries, so that diplomats become only one source of input.[104] Of course, such systems presuppose that adjudicators are equipped to sort through competing accounts and reach their own judgments about country conditions.

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[99] *See* UNHCR HANDBOOK, *supra* note 88, at 48.

[100] The UNHCR Handbook, for example, at one point states that adjudicators "are not required to pass judgment on conditions in the applicant's country of origin," although it does suggest that some such knowledge may help in the assessment of the applicant's credibility. *Id.* at 12-13. This is simply wrong. Such knowledge is useful, to be sure, in the latter setting. But the adjudicator cannot avoid passing judgment more broadly on country conditions as an unavoidable part of the ultimate decision on the merits. In the example in text, the applicant's credibility may be relevant only in deciding whether in fact she engaged in the union organizing activities she claims. The adjudicator might then proceed to recognize her as a refugee because she credits, wholly apart from anything the applicant says, numerous human rights reports describing a campaign of persecution directed against union leaders.

[101] The most comprehensive is the annual series of human rights country reports prepared by the U.S. State Department. *See, e.g.*, SENATE COMMITTEE ON FOREIGN RELATIONS AND HOUSE COMMITTEE ON FOREIGN AFFAIRS, 101ST CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1988 (Comm. Print 1989).

[102] In addition to comprehensive annual volumes published by Amnesty International covering most countries of the world, *see, e.g.*, AMNESTY INTERNATIONAL, 1988 ANNUAL REPORT, many organizations publish topical reports on conditions in a single country or region as the need arises. *See, e.g.*, AMNESTY INTERNATIONAL, BURMA: EXTRAJUDICIAL EXECUTION AND TORTURE OF MEMBERS OF ETHNIC MINORITIES (1988); INTERNATIONAL LEAGUE FOR HUMAN RIGHTS AND INTERNATIONAL HUMAN

Legislative facts should not be regarded, however, as simply something the adjudicator looks up or examines *after* she has completed the proceedings addressed to finding the adjudicative facts, even though much of her knowledge about country conditions will doubtless come from documentary sources rather than live testimony. Knowledge of political developments and patterns of persecution contributes toward making the final predictive judgment about risks faced if the individual returns home, but perhaps more importantly, such knowledge can also play a useful role in developing and assessing the adjudicative facts themselves.

This second use of knowledge about country conditions is often overlooked, but it remains crucial. An adjudicator thus equipped can better pick out those parts of the applicant's story that are most relevant, and can ask specific questions that will flesh out the testimony in the most helpful fashion.[105] Such expert questioning can also help expose inconsistencies and falsehoods more effectively. Since there are so few other checks on the asylum seeker's story (given that she is likely to be the only available witness to the key events), the system badly needs to make use of whatever other tools might be available for such assessment. But equipping adjudicators with such

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RIGHTS LAW GROUP, A REPORT ON HUMAN RIGHTS IN THE REPUBLIC OF KOREA 1980-1985 (1985); LAWYERS COMMITTEE FOR HUMAN RIGHTS, EL SALVADOR: HUMAN RIGHTS DISMISSED—A REPORT ON 16 UNRESOLVED CASES (1986); ROTH, REPRESSION DISGUISED AS LAW: HUMAN RIGHTS IN POLAND (Lawyers Committee for Human Rights 1987).

[103] *See, e.g.*, Thoolen, *Refugees and Information Technology*, REFUGEES, Oct. 1988, at 34. Nongovernmental organizations have taken the lead in this sharing process with the active cooperation of the UNHCR, which has recently become the focal point for an international network. *See* Int'l Refugee Documentation Network, Circular No. 3 (Mar. 1989) (reporting, inter alia, on recent efforts to strengthen the network, including training courses for documentalists and an internship program at UNHCR's Centre for Documentation on Refugees (CDR) in Geneva).

[104] *See* Aleinikoff, *supra* note 89, at 234.

[105] *See* Martin, *Comparative Policies on Political Asylum: Of Facts and Law*, in 9 IN DEFENSE OF THE ALIEN 105, 109-11 (1987); Martin, *The End of De Facto Asylum: Toward a Humane and Realistic Response to Refugee Challenges*, 18 CAL. W. INT'L L.J. 161, 167-69 (1987-88) [hereinafter Martin, *The End of De Facto Asylum*].

expertise is not just a device for spotting weaknesses or magnifying contradictions. Properly applied, it can also assist confused or inarticulate applicants in presenting fully the particularized information that will cast positive light on their claims. All this argues for making sure, to the maximum extent possible, that the adjudicators are themselves highly knowledgeable about country conditions.

c. *Predictive Judgment*

Finally, the information on the adjudicative and legislative facts must somehow be put together to reach a judgment as to the likely threat to the particular individual. For most of the countries from which current applicants come, it will be clear that persecution occurs at the hands of the government or societal elements beyond fully effective control of the government. But what is the threat to this particular individual upon return? One must venture into the realm of prediction to decide. Cumulative expertise would also be of assistance here; such a judgment is not something that emerges routinely from the evidence placed on record in the case before a passive adjudicator.

It is also clear, however, that room for controversy will almost always remain. This is not a scientific prediction based on regular laws or formulas; it is an assessment that should be based, as much as possible, on conscientious attention to country condition information and individual facts. As a result, the measure of an adjudication system's success cannot be the attainment of nearly universal acceptance of the rightness of the results, particularly negative results leading to deportation from the country. Success consists instead in achieving sufficient acceptance of the process, including respect for the judgment and fairness of the decisionmakers, so that final grants and denials are regarded as authoritative.

4. Difficulties of Cross-Cultural Communication

One final complication deserves emphasis. As is apparent, much of the adjudication process will turn on assessment of the credibility of the applicant. Ordinarily, a decisionmaker judges credibility by probing the internal consistency and detail of the testimony about past events, observing the demeanor of the witness, and comparing the testimony to that person's earlier accounts or to other evidence regarding the events described. But because asylum applicants usually come from cultures sharply different from that of the United States, these ordinary guideposts to decision may not work well—or at least they must be applied with considerable allowance for cross-cultural complications.[106] These complications have been ably catalogued and illustrated in a helpful article by Professor Kälin that should be read by all asylum adjudicators.[107] Persons interviewed for this study, particularly UNHCR personnel and attorneys for asylum applicants, frequently stressed that adjudicators must have the capacity to refrain from immediately applying tests and expectations derived solely from the culture of the haven state.[108]

Many asylum seekers come from societies where the population inherently distrusts or fears government officials (and often lawyers). Nothing in their past experience prompts them to open up readily to strangers, particularly when speaking of highly sensitive events. Thus, it is not surprising that in their first hours or even weeks or months in the United States they might fail to appreciate the new climate here that allows them to speak more freely and assertively. Many private attorneys interviewed for this study reported their own difficulties in winning trust and thus gaining candid accounts from their own clients. One experienced asylum attorney provided a graphic example. She reported that after spending nearly thirty hours with a reticent client, a Haitian asylum seeker, she believed she was prepared for a hearing. The day before the hearing, the client supplied some new information that revealed an entire new dimension to the story that she had been afraid to discuss earlier. Many more hours of patient interviewing were required to piece together the newly revealed true story, and concomitantly to bolster the client's trust in the attorney that would be needed for effective direct examination.

Furthermore, psychological studies indicate that some of the strongest candidates for asylum may be those applicants with the greatest difficulties presenting their cases. Those who have been tortured or have witnessed the brutal slaying of friends or loved ones may have great difficulty retelling the key elements of their accounts.

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[106] *See generally* Note, *Credibility Findings in INS Asylum Adjudications: A Realistic Assessment*, 23 TEX. INT'L L.J. 139, 142-43 (1988).

[107] *See* Kälin, *Troubled Communication: Cross-Cultural Misunderstandings in the Asylum-Hearing*, 20 INT'L MIGRATION REV. 230 (1986).

[108] A UNHCR officer in Canada suggested that the most important quality to be sought in an adjudicator is empathy: "Can this person understand what real refugees go through?" She emphasized, however, that people with this quality "can still be firm in saying no" when that is warranted; failure to reject the unqualified, she stressed, also "screws up the system." Interview with Paul LaRose Edwards, in Ottawa, Canada (Dec. 20, 1988).

At times, post-traumatic stress disorder may even block consistent memory of past events.[109]

American decisionmakers unaware of these complications are likely to seize upon inconsistency and reticence (particularly about matters that most Americans would regard as of the greatest importance) as evidence of dissembling—for reasons that usually hold good within our own cultural context. These actions are not such ready signals of dissembling, however, when the individuals involved come from sharply different cultural backgrounds. A reformed system must equip its decisionmakers to avoid snap judgments and make adequate allowance for cross-cultural difficulties. But such awareness must also be employed with care. Some of the writings about cross-cultural sensitivity seem almost to assume that there is an innocent explanation for any stumble, vagueness, or change of story.[110] This is not necessarily the case. A reformed system must also equip its adjudicators to sort through such phenomena and still be able to spot false tales—because sometimes inconsistency and reticence really do result from falsehood and not from more innocent explanations. The line to be walked is a fine one.

C. *The Imperative of Speedy Final Decisions*

The foregoing problems suggest genuine, indeed profound, difficulties in applying the legal standards with precision and fidelity. As long as these problems impair accurate decisionmaking, the system will have its own built-in magnet effect. When the process cannot reliably sort the qualified from the unqualified, asylum applicants drawn to the system will include not only those with a reasonable chance of qualifying, but also others whose claims are marginal or nonexistent. They will come hoping to take advantage of these very weaknesses to gain an undeserved benefit, namely, the award of asylum status and possibly eventual permanent residence.

In later sections, I propose measures to make the maximum use of the available information sources in service of the goal of accuracy. One might think that such an achievement would suffice to accomplish the fundamental objectives of our asylum program and also curb the magnet effect—by providing asylum to the persecuted and saying "no" to those who seek to use asylum mainly as a loophole. If accuracy were all we had to accomplish, we could embrace elaborate schemes that promise to serve that goal, even if they consumed a large amount of time to reach final decisions and employed multiple layers of administrative and judicial consideration as a check against error. Unfortunately, however, the magnet problem is more complex, in ways that demand an end to undue layering so as to preserve the capacity for speedy final and enforceable determinations.

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[109] *See, e.g.*, Allodi, Randall, Lutz, Quiroga, Zunzunegui, Kolff, Deutsch & Doan, *Physical and Psychiatric Effects of Torture: Two Medical Studies*, in THE BREAKING OF BODIES AND MINDS: TORTURE, PSYCHIATRIC ABUSE, AND THE HEALTH PROFESSIONS 58, 65-72 (E. Stover & E. Nightingale eds. 1985); Note, *supra* note 106, at 148-50; Rovner, *The Torture of the Refugee: Why Judges Don't Believe*, Wash. Post, Sept. 2, 1986 (Health Section), at 10, 11.

[110] For a court decision that verges on this approach, rejecting the immigration judge's negative credibility finding and asserting that earlier untrue statements and changed stories actually *supported* the persecution claim, see Turcios v. INS, 821 F.2d 1396, 1400 (9th Cir. 1987).

1. The Scope of the Magnet Effect

The magnet effect is not solely the product of perceived chances to gain full asylum despite a weak case. Benefits that applicants can expect to enjoy *before* a final ruling is issued in the case—a period that now can stretch for months, and usually lasts years—also contribute importantly to that phenomenon. Of course, to some extent both accuracy and speed are goals of any administrative adjudication system. But the need for expeditious finality is more intense here. In other adjudication processes, such as those governing disability claims or public welfare or licensing, the applicant ordinarily does not enjoy the benefit sought until there has been a determination on the merits that she fully qualifies. Nothing in the application and waiting process itself tempts the unqualified to clog the system. With political asylum, in contrast, the simple act of applying has usually brought important benefits that magnify the attractions, whatever the ultimate determination on the merits. With a few recent exceptions, the very act of applying for asylum has resulted, after a brief delay, in the issuance of preliminary papers that both authorize employment and permit free movement within U.S. territory. These two features comprise the bulk of the main benefits expected from asylum itself, particularly for those who know they have at best weak claims.[111]

The longer the period of enjoyment that comes simply from the act of applying for asylum, obviously the greater the attraction in filing a marginal claim. When word gets back to the home countries of those who initially benefit from such arrangements during the asylum-application stage, more and more people with marginal or nonexistent claims are likely to come, hoping to achieve at least the benefits of years of productive working life in a wealthy country, whatever the ultimate outcome.[112] A successful asylum system must thus place a high priority on speed in adjudications (including all stages of review) in order to avoid these incentives for marginal asylum seekers.

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[111] To be sure, the uncertainty about the duration of such benefits is a disadvantage. But it is a disadvantage that is doubtless felt more acutely by true refugees for whom there are genuinely grave risks if they return. Those who know they face little risk at home harbor fewer concerns about what will transpire once the asylum-seeker stage ends. In the meantime, they have nearly complete access to the job market and the other features of life in a stable, wealthy, and free society.

2. The Alternative of Deterrent Measures

Of course, speedier final decisions are not the only way to eliminate the artificial attractions of the asylum-seeker stage. One could simply end the provision of free movement and work authorization during this period. Many Western countries have been moving in this direction, imposing a variety of restrictions and deterrents that have raised the concern of UNHCR and provoked harsh condemnation from the nongovernmental organizations (NGOs) that support asylum seekers and advocate refugee causes. These restrictive practices include denials of work authorization, enforced housing in austere communal facilities, other limits on freedom of movement, and sometimes full-scale detention in jail-like facilities.[113]

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[112] Canada, for example, experienced an exponential growth in asylum claims filed by nationals of Trinidad and Tobago throughout 1987-88 (reaching 2739 such applications in 1988). Once its new system was implemented on January 1, 1989, promising swift rejection of manifestly unfounded claims, applications from Trinidad dropped to 15 in the first quarter of the year. *See* 63 Documentation-Réfugiés 1, 6 (Jan. 25-Feb. 3, 1989); Refugee Determination in Canada: First Quarter Review 9 (Apr. 25, 1989). For a more complete description of the new Canadian adjudication system, which appears to hold considerable promise, see the expanded version of this study (forthcoming Yale University Press). *See also* Blum & Laurence, *Cold Winds from the North: An Analysis of Recent Shifts in North American Refugee Policy*, 16 N.Y.U. Rev. L. & Soc. Change 55 (1987-88); Hathaway, *Postscript*, 34 McGill L.J. 354 (1989); Hathaway, *Selective Concern: An Overview of Refugee Law in Canada*, 33 McGill L.J. 676 (1988); Rusu, *The Development of Canada's Immigration and Refugee Board Documentation Center*, 1 Int'l J. Refugee L. 319 (1989).

[113] *See generally* Fullerton, *Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights*, 29 Va. J. Int'l L. 35 (1988); Martin, *supra* note 1. The United States has also employed Coast Guard interdiction of vessels coming from Haiti. Although the interdiction process is designed to include screening to permit persons with valid refugee claims to come to the United States, interdiction has evoked severe criticism. *See* T. Aleinikoff & D. Martin, *supra* note 3, at 724-26; Helton, *Political Asylum under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. Mich. J.L. Ref. 243, 254-56 (1984).

Considerable misunderstanding has arisen regarding the use of deterrent measures and restrictive practices. NGOs sometimes act as though any deterrent steps are illegitimate—sheer vindictiveness visited upon innocents, many of whom may prove to be bona fide refugees. Some perspective is needed. Designing policy to discourage the unqualified from even applying for a benefit is a perfectly legitimate policy objective, particularly when existing statistics demonstrate that a high percentage of applications lack merit.[114] To the extent that current measures are meant to encourage self-selection, so that only those with strong cases bother to leave their home countries, they address an unimpeachable administrative aim. In design, at least, these restrictive practices are meant to send a "general deterrence" message to persons still in the home country.

The message grows more complex in practice. At this preliminary stage, deterrent measures almost inevitably apply to all asylum applicants, whatever the strength or weakness of their claims. (To sort the strong from the weak at this stage—save for screening out wholly frivolous applications—would simply be too cumbersome, because of all the factual difficulties canvassed in the previous section.) Thus, the burdens of these measures often fall on genuine refugees.[115] It is not wholly surprising, then, that some judges might view these measures as penalties for filing an asylum claim, or as coercion meant to force current applicants to withdraw their applications and return home, rather than as deterrents addressed to those still in the home country, designed to convince them (if they are not substantially threatened) to decide against coming to the United States. If they see such measures this way, courts are likely to declare the deterrents invalid for conflicting with the statutory right to apply for asylum.[116]

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[114] Naturally, a major part of the NGO criticism stems from a belief that existing grant rates are woefully inadequate. But unless the grant rate should approach 100 percent, encouraging self-selection remains a legitimate aim.

[115] Some interviewed for this study, however, who advocated the detention of asylum seekers, argued (with some measure of plausibility) that the true refugee should be the least affected by such deterrents. They should see humane detention in the United States, for a limited period that will definitely end with a final adjudication, as a small price to pay to escape from actual persecution in the homeland. True refugees, such persons argued, would not begin to think about withdrawing the application and returning home, for the fate there is clearly worse. Only those facing little real risk at home might be tempted ("coerced," as the other camp would describe it) to withdraw an application in order to end the detention. If the fate at home is that much less intimidating than a few months in detention here, detention advocates argue, then such persons do not merit asylum in any event.

[116] *See, e.g.*, Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1510 (C.D. Cal.

The basic problem is that these deterrent measures and restrictive practices are indiscriminate in their impact. By their very nature, they fall equally on deserving refugees and the most flagrant abusers during the asylum application stage. A case could even be made that they fall with more debilitating effect on true refugees, because lengthy uncertainty over their ultimate fate, coupled with enforced idleness and perhaps prison-like detention, will carry the most severe psychological impact for those who know with substantial assurance that persecution awaits them at home. (It may be even more devastating for those who have already been tortured or severely mistreated.) For these reasons, such deterrents plainly should be avoided if workable alternatives are available.[117] At best these deterrent measures are crude tools, meant to send a message to marginal applicants discouraging them from leaving the home country, but capable of implementation only by imposing harshness on true refugees as well, those who will ultimately be found to merit asylum.

3. Toward a Better-Targeted Deterrent

We need instead a discriminate deterrent, more precisely focused on the marginal cases, and one that takes away the artificial attractions of the asylum applicant stage of the proceedings. Such a deterrent is available, *if* we can change the adjudication system to achieve one crucial result: the prompt reappearance in the home village of applicants whose cases were at best marginal. Such an event makes apparent to others similarly situated that such a trip is not worthwhile; they will not be able to work long enough even to repay the "travel agent's" fee.[118] Speedy finality is the essential precondi-

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1988) (granting injunction because INS practices and procedures at detention centers "discourage class members from exercising and pursuing asylum"); Nunez v. Boldin, 537 F. Supp. 578, 586 (S.D. Tex.) ("The present procedures do not sufficiently assure that genuine asylum claims will be heard . . . ."), *appeal dismissed*, 692 F.2d 755 (5th Cir. 1982). Other courts, however, have been more willing to sustain detention schemes, including their use for explicit deterrent purposes. *See, e.g.*, Amanullah v. Nelson, 811 F.2d 1, 15 (1st Cir. 1987); Singh v. Nelson, 623 F. Supp. 545, 556-61 (S.D.N.Y. 1985). *See generally* Helton, *The Legality of Detaining Refugees in the United States*, 14 N.Y.U. REV. L. & SOC. CHANGE 353 (1986); Schmidt, *Detention of Aliens*, 24 SAN DIEGO L. REV. 305, 329-33 (1987) (discussing detention of asylum applicants).

[117] For an elaboration of these points, see Martin, *supra* note 1.

[118] Some critics of an earlier version of this study made much of the lack of proof that such returns would really deter other migrants. It is true that no empirical studies support this claim. Nor are there any, to my knowledge, that disprove it. Reliable testing procedures would be difficult to develop.

Suggestive support can be found, however, in much recent social science tion of this deterrent. The message is lost if two or three years pass between departure and return, particularly if the applicant has been working while the application was pending.

How much speed is necessary? We lack empirical data to calculate the outside limits with any kind of accuracy (and anyway the calculations would vary by country and by travel agent). But if all but the most complicated cases could reach finality within six to nine months, including all the stages of consideration and review, little in the application process would add artificially to the attractions of the asylum system.

NGOs that strongly oppose indiscriminate deterrent practices—for good and worthy reasons—should remember that the best way to help avoid them, or reduce their harmful impact, is to cooperate with the government in fashioning a speedy and accurate system that can accomplish *discriminate* deterrence. This point cannot be overemphasized. In the absence of the capacity to make final decisions quickly, officials have no way to respond to legitimate public concerns over massive influxes, unless they turn to the deterrent measures and restrictive devices that NGOs and the UNHCR condemn. To defeat prudent streamlining of the adjudication process is to invite reliance on cruder measures of deterrence. Mere nominal acceptance of the need for expeditious proceedings is not enough. Refugee advocates

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literature. Criticizing simplistic "push-pull" models of migration, these works emphasize the role of social networks in encouraging and sustaining migration. That is, if the first emigrants from a particular community succeed in establishing themselves in a new country, their experience, communicated homeward (often along with significant remittances), encourages others from the same locale to make the trip. Moreover, their presence in the target city or town within the new country helps others during the difficult early months. *See, e.g.*, Boyd, *Family and Personal Networks in International Migration: Recent Developments and New Agendas*, 23 INT'L MIGRATION REV. 638 (1989); Massey, *Understanding Mexican Migration to the United States*, 92 AM. J. SOC. 2 (1987); Portes & Böröcz, *Contemporary Immigration: Theoretical Perspectives on its Determinants and Modes of Incorporation*, 23 INT'L MIGRATION REV. 606 (1989).

Although such studies generally address "guest workers" and similar economic migration and do not focus on asylum-seeker networks, there is no reason to believe that this phenomenon would fail to operate in the latter context. Much anecdotal evidence about the role of asylum "travel agents" and similar entrepreneurs fits readily within these network theories. *See supra* note 64 and accompanying text. Moreover, the disparate caseload patterns in adjoining asylum countries also suggest a network effect. In 1989, for example, Canada received 1,966 Sri Lankan asylum seekers, *see* [Canadian] Immigration and Refugee Board, News Release of Jan. 19, 1990, at 4; the United States only 40. *See* INS, ASYLUM CASES FILED WITH DISTRICT DIRECTORS, FISCAL YEAR 1989 THROUGH SEPT. 1989 (CORAP table). Swift deportation of unsuccessful asylum seekers would seek to break that chain and would be designed to send a very different message back to the source communities.

will have to join in making difficult decisions about the trimming of certain procedures (which will undeniably carry some costs to the goal of accuracy) in order to achieve truly speedy determinations.

A second point concerning restrictive measures and deterrents may be more immediately relevant. From the government's standpoint, most of these other restrictions do not eliminate the priority for speed; they simply create other reasons for embracing it as a vital goal. The U.S. government probably cannot simply deny work authorizations (now seen by some as a major contributor to an artificial magnet effect) to asylum applicants without establishing some other public scheme to provide for the subsistence needs of the idled asylum seekers until they are either recognized as refugees or removed from the country. Whether such provision is made in communal facilities or in actual detention centers, it will still require a substantial commitment of public resources. Every day of added delay, therefore, compounds the expense imposed on the public treasury.[119]

There is a final reason for embracing speedy procedures, derived from the perspective of the legitimate and meritorious claimant—for whose benefit, after all, asylum protections were initially adopted. *Initial* decisions in many district offices now take six to eight months, largely because of backlogs created by the overload of asylum applications. Bona fide applicants with qualifying cases should not have to wait so long to have the burden of uncertainty lifted from their shoulders. As indicated, their primary need is to find the calm and security that will enable them to rebuild some semblance of a normal life. They are much more likely to make a successful transition (including recovering from past episodes of torture or other traumatic mistreatment) if security, in the form of a settled and reasonably permanent immigration status comes quickly after arrival.

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[119] *See* Appendix (for cost estimates). In fact, truly expeditious and accurate procedures might further support the use of detention or enforced housing arrangements and denial of work authorization during the asylum-seeker stage. The main objection to these measures has been their baleful impact on bona fide claimants. But if most bona fide claimants can be recognized in the first-round proceeding and thus need wait only a short period (say two to three months) in such a setting, much of the unintended coercive impact disappears. The Select Commission on Immigration and Refugee Policy in fact recommended such arrangements, focusing on accommodation in "federal asylum processing centers" in its recommendations for coping with "asylum emergencies." These recommendations appear to have presupposed speedy determinations. *See* SELECT COMMISSION, *supra* note 69, at 165-68.

Speedy finality is imperative. It must not be achieved at the complete expense of either accuracy in outcomes or fairness in the process, but some tradeoffs will be necessary. Speed here is not simply the kind of virtue it may be in some other administrative settings—desirable but optional, a pleasing accomplishment if achievable, but not gravely damaging if other aims preclude its attainment. Speedy denials of unworthy asylum applications, followed by prompt deportation, are indispensable if we are to implement the only really humane deterrent available to the system. In time of large-scale influx, the inability to deport the unqualified in fairly short order will lead governments to resort to other costly and troublesome deterrents which indiscriminately burden genuine refugees.

III. The American Adjudication System

A. *Historical Background*

The earliest American regulations establishing procedures for asylum and related adjudications appeared in 1953, implementing the 1952 version of § 243(h) of the Immigration and Nationality Act (INA).[120] They provided for "interrogation under oath by an immigration officer" to examine the claim that the alien would be subject to physical persecution if deported. The regulations permitted the presence of an attorney, at the alien's expense, but said nothing more about the attorney's role during the interrogation. Final decisions, presumably based on the record of the interview, were to be rendered by the Commissioner or Assistant Commissioner—a cumbersome requirement changed a year later to vest that authority instead in regional commissioners of the Immigration and Naturalization Service (INS).[121]

In 1962, new regulations took effect establishing different arrangements for persecution claims in deportation proceedings. They established specific procedures for the immigration judge (then called a special inquiry officer) to designate an alternate country of deportation, in case the country the alien chose refused to accept him, and they required the judge then to advise of the possibility, under § 243(h) (which was then still a discretionary provision), of withholding deportation to that country. If the alien chose to claim that protection, she received ten days to file an application documenting her persecution claims, after which she would be examined under oath on these issues as in a deportation proceeding.[122] Later amendments made clear that an INS trial attorney could also introduce evidence bearing on the persecution claim.[123]

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[120] *See* 18 Fed. Reg. 4925 (1953) (adding 8 C.F.R. § 243.3(b)(2)).

[121] *See* 19 Fed. Reg. 9172, 9179 (1954) (amending 8 C.F.R. § 243.3(b)(2)).

By 1962, then, the two basic patterns for asylum and related adjudications that our system has known had already emerged. On the one hand, INS made some determinations based on a nonadversarial interview or interrogation carried out by an immigration officer. In other settings, immigration judges decided whether to provide relief from deportation after more formalized trial-type proceedings. In succeeding years, INS refined the nonadversarial procedures, vesting the ultimate decisionmaking authority not in the regional commissioners or higher officials, but in the district directors, who of course relied in practice, most of the time, on the immigration officer who conducted the interview. As INS discovered more and more settings (outside the deportation procedure) in which persecution claims might arise, it adopted a variety of new regulations and instructions specifying that district directors, rather than immigration judges, were to hear and determine those matters. For example, district directors received authority to make final decisions on persecution claims by alien crewmen,[124] excludable aliens,[125] and applicants for the special benefits of INA § 203(a)(7) who were already in the United States.[126]

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[122] *See* 26 Fed. Reg. 12,110, 12,112 (1961). With a few modifications, this provision, 8 C.F.R. § 242.17, remains in the regulations and affords one avenue for consideration of withholding by the immigration court. Most applicants today, however, affirmatively apply for asylum much earlier in the immigration court proceedings, under other regulations.

[123] *See* 39 Fed. Reg. 25,642 (1974) (amending 8 C.F.R. § 242.17(c)).

[124] *See* 32 Fed. Reg. 4341, 4342 (1967) (amending 8 C.F.R. § 253.1(f)). This assignment of authority to the district directors, to the exclusion of special inquiry officers (now called immigration judges), was approved, over vigorous dissent, in INS v. Stanisic, 395 U.S. 62 (1969). Interestingly, this provision, which provides protections only to those fearing persecution in Communist countries, was not amended in the wake of the Refugee Act of 1980, which mandated neutral and apolitical standards in refugee matters. It survives as a kind of dinosaur in the Code of Federal Regulations. Crewmen from other countries, however, may still claim asylum under other provisions.

[125] This was initially established in the less formal "Operations Instructions," and enshrined in the regulations only in 1974. *See* Pierre v. United States, 547 F.2d 1281, 1285 (5th Cir.), *vacated and remanded to consider mootness*, 434 U.S. 962 (1977).

[126] *See* 30 Fed. Reg. 14,772, 14,779 (1965) (adding 8 C.F.R. § 245.4), *amended*, 34 Fed. Reg. 19,799 (1969). INA § 203(a)(7) was enacted primarily to authorize overseas refugee programs for the resettlement of persons who fled persecution in Communist countries or countries "within the general area of the Middle East." *See* 8 U.S.C. § 1153(a)(7) (1976). But a proviso allowed for adjustment of status to

In 1970, a Lithuanian seaman named Simas Kudirka was forcibly returned to a Russian vessel a few hours after she had escaped to a U.S. Coast Guard cutter. Although INS had not been involved in this extraordinary incident, the ensuing outcry launched a complete review of asylum procedures used by all agencies.[127] Eventually INS promulgated new asylum regulations, permitting both excludable and deportable aliens to apply to the district director for asylum on a new form, Form I-589. These 1974 regulations also made specific provision for a practice that had already taken root. They required the district director to seek the views of the State Department on an asylum claim, while also giving the alien an opportunity to explain or rebut any State Department comments before a decision could be based thereon. Such comments were not binding on the adjudicator, but if the district director decided to deny an application despite a favorable State Department letter, she had to certify her ruling to the regional commissioner for final decision.[128]

Under the 1974 regulations, any deportable alien denied asylum could, in essence, renew the claim in deportation proceedings by applying to the immigration judge for protection under § 243(h). However, for excludable aliens, those apprehended at the border before making an entry into the United States, the district office remained the only venue for an asylum claim. Within a few years, excludable Haitians challenged, on due process grounds, the regulations' failure to permit an "evidentiary hearing" (of the type provided in immigration court proceedings) when so much was potentially at stake.[129] District courts split on the issue, but the Fifth Circuit eventually ruled for the government, approving the regulations.[130] While the asylum seekers' certiorari petition was pending in the Supreme Court, however, the newly installed Carter Adminis-

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permanent resident of those who had been physically present in the United States for two years and could prove that they qualified. *See generally* T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 622-23 (discussing this version of INA § 203(a)(7)).

[127] The State Department's resulting policy was announced in 1972 and remains in force today with slight changes. *See* Public Notice 351, Request for Asylum—Policy and Procedures, 37 Fed. Reg. 3447 (1972), *modified,* Public Notice 728, Requests for Asylum, 45 Fed. Reg. 70,621 (1980).

[128] *See* 39 Fed. Reg. 41,832 (1974) (adding 8 C.F.R. pt. 108), *amended,* 40 Fed. Reg. 3407, 3407-08 (1975).

[129] This had long been a matter in contention; it was the central dispute between the majority and dissent in a Supreme Court case construing the regulations governing asylum claims filed by alien crewmen. *See* INS v. Stanisic, 395 U.S. 62 (1969).

[130] *See* Pierre v. United States, 547 F.2d 1281, 1290 (5th Cir.), *vacated and remanded to consider mootness,* 434 U.S. 962 (1977).

tration decided to accede to the plaintiffs' demands, finding merit in the due process concerns and seeing no major costs if the change were made.[131]

In considering new regulations to implement that 1977 concession, INS attempted to take to heart the vigorous objections to district director adjudications that had been voiced throughout the earlier litigation—assertions which made it sound as though such a setting could never provide justice in asylum cases.[132] In consequence, the agency promulgated regulations in 1978 that would have made the immigration court, with very limited exceptions, the only forum for consideration of such asylum claims, for either excludable or deportable aliens.[133]

To INS's legitimate surprise, refugee advocates suddenly displayed a change in perspective. They filed comments on the regulations, as well as briefs in litigation, that revealed a remarkable rediscovery of the virtues of nonadversarial proceedings before the district directors, exactly the officials whose decisions had been so heavily criticized in the course of the earlier litigation. Nonadversarial hearings in the district office, it was asserted, would be less frightening for the applicants, particularly those with meritorious cases who were probably the most easily intimidated. Such proceedings would also allow for swift grants when they were warranted.[134]

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[131] *See* Memorandum of Solicitor General Suggesting Mootness, Pierre v. United States, 434 U.S. 962 (1977) (No. 77-53).

[132] *See, e.g.*, Petition for Certiorari at 18-22, *Pierre v. United States*, 434 U.S. 962 (1977) (No. 77-53).

[133] *See* 43 Fed. Reg. 40,801, 40,802 (1978) (amending 8 C.F.R. pts. 108 and 236) (affecting excludable aliens and intended to take effect immediately), *modified*, 43 Fed. Reg. 48,620 (1978) (in response to litigation, INS stayed the initial rulemaking to allow public notice and comment). Also, at the time of the first rulemaking, INS promulgated proposed rules intended to work the same changes for deportable aliens; that is, to make the immigration court the only venue for asylum claims. *See* 43 Fed. Reg. 40,879 (1978).

[134] *See, e.g.*, 44 Fed. Reg. 21,253-56 (1979) (summarizing comments received on 1978 proposed rules). Similar sentiments were expressed with regard to the 1980 interim rules:

> A number of commenters suggested that all applications for asylum, whether filed before or after the institution of exclusion or expulsion proceedings, should be decided by the district director. Proceedings before the district directors were viewed as less adversarial in nature and were providing the applicants with a freer atmosphere within which to present their claims. It was pointed out that many applicants have fled from countries where the judicial process is suspect and feared by them and, they would not feel free to present their claims with the same candor that they could in a proceeding before a district director.

48 Fed. Reg. 5885 (1983).

Feeling somewhat blindsided, the agency nonetheless largely acquiesced. The final rules retained the same two-tier de novo consideration for deportable aliens, although the rules did insist on channeling all claims by excludable aliens into the immigration courts.[135]

Refugee advocates were not entirely satisfied. Because legislation that became the Refugee Act of 1980 was then proceeding through Congress, hearings on that bill provided a forum to continue the pressure for a more extensive role for the district directors in considering asylum claims. Eventually, their lobbying secured a measure of congressional support for such changes.[136] INS paid heed to these messages, and its interim rules implementing the asylum provisions of the Refugee Act granted both excludable and deportable aliens an opportunity to be heard first in nonadversarial proceedings before the district director, provided no charging document had yet issued.[137] If unsuccessful, the claimants retained the right to renew their asylum claims before the immigration judges in exclusion or deportation proceedings.[138] With minor changes, these interim asylum rules were made final in 1983, retaining the opportunity for two rounds of de novo consideration.[139]

B. *The Current System*

Current regulations thus establish a complex system—rendered even more intricate when one takes account of all the layers of review, both mandatory and advisory. The following description, which draws heavily upon the interviews and field observations conducted for this Article,[140] sketches the stages of consideration through which an asylum application can proceed.

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[135] *See* 44 Fed. Reg. 21,253, 21,258 (1979). These provisions adopted final rules requiring that asylum claims by excludable aliens be heard exclusively by immigration judges, but permitted deportable aliens not yet in proceedings to file before the district director, without prejudice to later consideration of the claim by the immigration judge. If an order to show cause had already issued, however, asylum and related claims could be heard only by the immigration judge. *See id.*

[136] *See, e.g., The Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcomm. on Int'l Operations of the House Comm. on Foreign Affairs,* 96th Cong., 1st Sess., 89-93 (1979) (testimony of Dale F. Swartz, Director of the Alien Rights Law Project of the Lawyers' Comm. for Civil Rights Under Law); S. Rep. No. 256, 96th Cong., 1st Sess. 9 (1979) (stating Senate Committee's preference for allowing asylum applicants the opportunity to have their claims considered outside exclusion or deportation proceedings, provided no order to show cause had issued).

[137] *See* 45 Fed. Reg. 37,392 (1980) (interim regulations adding, inter alia, a new 8 C.F.R. pt. 208 governing asylum).

[138] *See* 45 Fed. Reg. 37,392, 37, 395 (1980) (codified 8 C.F.R. § 208.9 (1989)).

[139] *See* 48 Fed. Reg. 5885 (1983) (codified 8 C.F.R § 208.1(b) (1989)) (final rule amending the earlier regulations to make clear that jurisdiction vests in the immigration judge once a charging document is served, even if the asylum claim was already pending in the district office).

1. District Office

Spontaneous asylum claims, often called "walk-ins" by INS officers, receive initial consideration in the district office. To start the process, the asylum seeker files the basic application form, Form I-589, along with any supporting documents. The four-page form asks numerous questions, including queries about past political activities, membership in organizations, current whereabouts and status of family members, and the applicant's reasons for fearing persecution. Officials sometimes complain that many completed forms provide only the scantiest information or seem to follow formulaic patterns.[141] Other applications, usually prepared with the assistance of counsel, are accompanied by stacks of documents, including both affidavits and more generalized information such as news accounts and reports from human rights organizations. INS charges no fee for filing the I-589.

All district offices provide for an interview by an examiner, but they vary in the precise arrangements. INS places some emphasis on having the interviews conducted by experienced examiners (usually at the GS-11 grade or higher), who have received special training for this task.[142] Offices with heavy walk-in traffic have several such examiners, who do nothing but asylum and related refugee work during their rotation into this assignment (lasting twelve months or more). Smaller offices, however, may of necessity assign these functions to an examiner who has not had the special training and who may devote as little as twenty-five percent of her time to asylum.

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[140] Interviews were conducted with: INS Central Office officials (Sept. 1985, July 1988, and Aug. 1988); with personnel of the Executive Office of Immigration Review (EOIR—the unit of the Justice Department that includes the BIA, immigration judges, and certain administrative law judges) in Falls Church, VA (Aug. 1988); with other Justice Department officials and State Department officials (July 1988 and Aug. 1988). I also interviewed immigration judges, INS district office officials, private attorneys and voluntary agency representatives, at the following locations: Miami (Nov. 1985); San Diego (Feb. 1987); Washington (Oct. 1988); New York (Nov. 1988). These visits were supplemented by telephone conversations at various times to clarify matters, by conversations at numerous immigration-law conferences, and by telephone conversations with officials and attorneys in other locations.

[141] *See* Dietrich, *United States Asylum Policy*, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s 67, 70 (D. Martin ed. 1988); P. Fagen, Applying for Political Asylum in New York: Law, Policy and Administrative Practice 31 (Occasional Paper No. 41, New York Research Program in Inter-American Affairs 1984).

[142] The training program has recently been refined under the guidance of a new officer in the INS Central Office who formerly worked with the UNHCR. The program now includes sessions on the legal provisions and country conditions, and usually permits trainees to conduct simulated interviews, followed by critique. These measures represent a considerable improvement over earlier practices, when asylum

Some districts hold the interview at the time of the filing, but most offices with a high volume of asylum traffic schedule interviews some weeks or months after receiving the application. New York is typical of the latter. When visited for this study in November 1988, the New York office had one supervisor and four experienced examiners who had been doing this work for several years. A fifth examiner in the Refugee, Asylum and Parole section had less experience and so was usually assigned to more routine functions, such as processing renewals of asylum status or adjustments to permanent residence of persons admitted through the overseas refugee program. The office ordinarily had been able to schedule asylum interviews within sixty days of filing (a date that has significance for work authorization purposes),[143] but recent increases in applications had jeopardized that timing. In an effort to keep up with applications, the office began scheduling twenty interviews per day per available examiner, although not all of the scheduled applicants were expected to show up. The press of business eliminated any opportunity for examiners to specialize by region of origin of the applicants; when one interview was finished, the examiner simply proceeded to a central table and picked out the file of the person who had been waiting the longest. This caseload permitted only about twenty minutes per interview, although examiners had discretion to take more time if the case required it.

The interviews usually concentrate on filling in any gaps in the

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training was minimal and examiners had to rely on "on-the-job learning." *See* IMMIGRATION & NATURALIZATION SERVICE, ASYLUM ADJUDICATIONS: AN EVOLVING CONCEPT AND RESPONSIBILITY FOR THE IMMIGRATION AND NATURALIZATION SERVICE 33 (June 1982) [hereinafter ASYLUM ADJUDICATIONS] (a quasi-official internal INS study). This 1982 internal study recounted one almost touching vignette that indicates the inadequacies that have beset INS adjudications: "One officer said that when she was assigned to asylum work, she bought a subscription to *Newsweek* magazine to 'learn more about' countries overseas." *Id.* at 33 n.*. The officer's initiative is to be applauded. But the fact that asylum adjudication might be assigned to someone who does not already keep up with international affairs at a level represented by weekly general circulation magazines is disheartening. That she had to pay for her own *Newsweek* is perhaps even more revealing.

[143] *See* 8 C.F.R. § 274a.13(d) (1989) (requiring adjudication of an application for employment authorization within 60 days or else interim employment authorization, good for 120 days, is to be granted).

information presented on the I-589, primarily with a view toward transmitting it all to the State Department for its advisory opinion. Typically, the examiner records right on the form in red pen any supplementary information developed, although some examiners also write out a few sentences of interview notes on a separate sheet as well. There is considerable variety in the conduct of the interview, depending on the style of the examiner, availability of interpreters (or examiners with foreign language skills), and related factors. INS, of course, assumes responsibility for making translation available, but the interpreter for a particular language may be tied up in immigration court when needed for an asylum interview in the district office. For that reason, INS occasionally relies on family members or friends of the applicant for these purposes. Interviews also vary considerably in thoroughness. One examination I attended in Miami in late 1985 (when caseloads were less demanding) lasted nearly an hour. The examiner spoke fluent Spanish and was trying with some creativity to flesh out the full dimensions of the story told by the Nicaraguan applicant. But another examiner in the same office engaged in only perfunctory questioning, concentrating on the applicant's manner of entry and other administrative details, rather than on the persecution claim. She completed her sessions in about fifteen minutes.

In Miami, at that time, few applicants appeared with counsel. In New York in 1988, however, the asylum supervisor estimated that perhaps eighty percent of applicants were represented, although asylum attorneys in New York thought that number a bit high. Attorneys usually play only a bystander's role, partly because examiners wish to hear directly from the applicant, and partly because, as one attorney explained it, not much happens: The interview is "an untaxing experience." Although relations with attorneys appear to be satisfactory much of the time, most attorneys interviewed recalled particular instances where they were thwarted from playing a needed role, or occasionally where the examiner was abusive or hostile in dealings with the applicant.[144]

The regulations mandate issuance of work authorization to "nonfrivolous" asylum applicants, and require that such authorization be provided during all stages of administrative and judicial review.[145] Many attorneys expressed frustration, however, that INS rarely issues such authorization at the time of filing, no matter how solid the case.[146] Instead, the applicant almost always must wait until the interview, which may be sixty days away.[147] A substantial portion of the interview time is therefore consumed with work authorization, including the rather cumbersome physical process required to replace the old I-94 form in the applicant's passport with a new one stamped "employment authorized." Obviously, this preoccupation further impairs the opportunity to use the interview to examine in detail the particulars of the applicant's persecution claim—one important reason why the interviews are often "untaxing."

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[144] The American Immigration Lawyers Association (AILA) collected affidavits recounting some of these complaints and filed them as part of their opposition to the proposed regulations promulgated in August 1987, described *infra* notes 194-99 and accompanying text (affidavits on file with the *University of Pennsylvania Law Review*).

Not infrequently, applicants receive no ruling on their asylum applications by the time the original employment authorization period expires. They may then have considerable difficulty gaining extensions, for few district offices have clear channels for making such decisions. Under the prodding of the immigration bar, INS is now trying to improve arrangements for such extensions, as well as for work authorizations for denied applicants who wish to renew their applications in immigration court proceedings.[148] The fruits of the interview—the annotated I-589 with attachments plus any separate interview notes—are collected for transmission to the State Department's Bureau of Human Rights and Humanitarian Affairs (BHRHA), under a standard cover sheet containing blanks that allow the examiner to provide some additional insights. For example, the examiner is asked to characterize the verbal testimony (convincing, unconvincing, specific, generalized, etc.) and to provide a preliminary assessment (grant, deny, non-committal). State Department officers said that examiners often fail to fill out these portions of the form.

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[145] *See* 8 C.F.R. §§ 274a.12(c)(8), 274a.13(a) (1989).

[146] *See* Memorandum from Richard E. Norton, INS Associate Commissioner for Examinations (July 9, 1987), *reprinted in* 64 INTERPRETER RELEASES app. III, at 886, 886-87 (1987) (setting forth standards for deciding on "frivolity"). In December 1988, in an apparent attempt to curb the attraction of asylum filings, INS issued instructions to field offices stating that the I-589 was not to be taken per se as a work authorization request; a separate application would have to be filed. *See INS Clarifies Work Authorization Procedures for Asylum Applicants*, 66 INTERPRETER RELEASES 130, 131 (1989). INS has also clarified the steps necessary to continue work authorizations if the alien wishes to renew the asylum claim in immigration court proceedings. *See INS Advises on Work Authorization for Denied Asylum Applicants*, 65 INTERPRETER RELEASES 718 (1988).

[147] Some offices fell much further behind in scheduling interviews and issuing work authorizations, prompting litigation seeking, among other things, to mandate compliance with the 60-day limit in the regulations. *See* Mendez v. Thornburgh, No. 88-04995 JJH (C.D. Cal. amended complaint filed Jan. 30, 1989), *summarized in Asylum Litigation Update*, 66 INTERPRETER RELEASES 151, 152 (1989).

[148] *See INS Advises on Work Authorization for Denied Asylum Applicants*, 65 INTERPRETER RELEASES 718 (1988); *see also* Alfaro-Orellana v. Ilchert, 720 F. Supp. 792, 798 (N.D. Cal. 1989) (finding that work authorizations granted to nonfrivolous asylum applicants do not terminate upon district office denial of asylum, but continue during the entire time that applications are being pursued, up until either abandonment or final adverse decision); Doe v. Meese, 690 F. Supp. 1572, 1577 (S.D. Tex. 1988) (requiring INS to grant to alien interim employment authorization where agency had failed to complete action on her request for work authorization within period specified by its own rule); Diaz v. INS, 648 F. Supp. 638, 656 (E.D. Cal. 1986)

After the State Department's views are returned to INS, the applicant receives some form of notice, depending on what the district office intends to do with the case. If asylum is to be granted, the applicant receives a letter calling her in to complete the paperwork for asylee status. If denial is indicated, the applicant receives notice of intent to deny, along with a copy of the State Department letter. The applicant then has 15 days to rebut or supply additional information.[149] "Eager young lawyers," one examiner told me, sometimes treat this notice as an invitation to provide several pounds of additional material. On rare occasions the new information is returned to the State Department for further review, but usually the matter is simply scheduled for final consideration by an examiner after the rebuttal period has passed. In New York, this whole process can last seven or eight months from the time of the interview; the process almost surely will require at least four months. For this reason, no effort is made to return the file to the original interviewer. In any event, she probably would have no independent recollection of the case. Several examiners told me that the State Department views "count for a lot,"[150] although all were aware that they were not bound by the Department's position.

(granting preliminary injunction to aliens prohibiting revocation of work authorization until adjudication process for asylum claim had been completed).

[149] Under a recently implemented procedure described below, if State responds with a preprinted sticker indicating simply that it has nothing to add, the district office may proceed to a negative decision without issuing a notice of intent to deny. *See Don't Deny Asylum Cases Just Because of BHRHA "Sticker" Responses, INS Says,* 66 INTERPRETER RELEASES 351 (1989).

[150] An internal study of INS asylum procedures confirms the great weight carried by State Department letters. *See* ASYLUM ADJUDICATIONS, *supra* note 142, at 57-64. A GAO study based on 1984 advisory opinions found that the Justice Department's final decision agreed with the State advice in 96 percent of the cases worldwide. *See* GENERAL ACCOUNTING OFFICE, ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN—FEW DENIED APPLICANTS DEPORTED 22, 42 (1987).

TABLE I

ASYLUM CASES FILED IN INS DISTRICT OFFICES

Fiscal year	Total received
1984	24,291
1985	16,622
1986	18,889
1987	26,107
1988	60,736
1989	101,679

Source: Immigration and Naturalization Service.

Table I provides statistics on the rising caseloads of the district offices, and Table II shows approval rates by nationality for fiscal year 1988 and cumulatively for the last five years. The statistics show the number of "cases." Because a case may represent applications for several members of a nuclear family, who are treated together in accordance with INA § 208(c), actual numbers of asylum seekers are higher than what is shown in the Tables. Moreover, the tables do not include applicants who apply only before the immigration judges.

TABLE II
GRANTS AND DENIALS BY NATIONALITY
ASYLUM APPLICATIONS FILED IN INS DISTRICT OFFICES

	June 1983-September 1988 Cumulative[a]			Fiscal year 1988			
Country	Approval Rate for Cases Decided	Cases Granted	Cases Denied	Approval Rate for Cases Decided	Cases Granted	Cased Denied	Cases Pending
TOTAL[b]	27.8%	28,416	73,753	39.1%	5,531	8,582	73,109
Iran	61.7%	12,459	7,727	75.0%	764	254	1,373
Romania	61.4%	895	562	82.9%	345	71	341
Czechoslovakia	44.7%	123	152	44.8%	13	16	72
Syria	39.4%	186	285	65.7%	25	13	100
Ethiopia	39.0%	1,340	2,089	77.0%	441	131	525
Poland	38.0%	2,686	4,365	53.7%	433	373	2,099
Afghanistan	37.0%	402	684	39.5%	36	55	91
China	32.6%	167	345	69.7%	60	26	142
Vietnam	31.3%	68	149	80.0%	8	2	9
Hungary	30.0%	175	407	28.9%	24	59	172
Nicaragua	27.9%	7,255	18,688	53.1%	2,786	2,455	21,054
Uganda	26.0%	91	258	51.7%	15	14	34
Somalia	24.1%	143	449	67.9%	55	26	122
Philippines	18.0%	82	372	10.0%	4	36	94
Cuba	13.3%	321	2,080	31.9%	30	64	13,873
Yugoslavia	13.3%	53	344	9.2%	6	59	176
Pakistan	13.0%	63	420	57.8%	33	24	89
Liberia	10.5%	30	255	15.0%	3	17	32
Lebanon	7.0%	113	1,499	36.6%	56	97	222
Honduras	4.3%	18	398	7.4%	10	125	512
El Salvador	2.7%	667	23,805	2.7%	110	3,822	24,375
Guatemala	2.1%	45	2,086	5.0%	24	447	6,191
Haiti	2.0%	36	1,713	31.5%	6	13	399
Egypt	1.0%	8	754	0.5%	1	19	32
India	1.0%	4	379	15.0%	3	17	29
Bangladesh	0.2%	1	416	16.6%	1	5	10

[a] Since May 1983, INS has kept asylum statistics by number of cases; each case, or application, may include more than one individual. The table cumulates the data only from the time this statistical uniformity was established.

[b] The total includes all nationalities, not only those designated here.

Source: Immigration and Naturalization Service, as compiled in REFUGEE REPORTS, Dec. 16, 1988, at 14.

2. Immigration Court

Claimants whose applications were denied in the district office may renew their asylum applications before the immigration judges when deportation or exclusion proceedings begin. If the alien applies for asylum only after those proceedings have been initiated, immigration court will provide the only available forum.[151] In either case, the process is virtually identical. It is initiated by filing Form I-589, along with any accompanying documents, with the docket clerk.[152] The clerk then forwards a copy to the State Department. Although the regulations seem to preclude (with limited exceptions) State Department referral if the district office earlier received an advisory letter,[153] docket clerks now routinely transfer the files without checking for earlier letters. Not only is this arrangement less cumbersome for the clerk, but it also fits better with the desire of the Executive Office of Immigration Review (EOIR) to assure the independence of the present proceedings from earlier INS consideration. State Department officers reported that they received less complete files from the immigration courts, perhaps because some docket clerks resist mailing lengthy documentary attachments. In any event, State clearly receives nothing equivalent to the district office examiner's notes. Some judges even provide a cover sheet pointedly stating that no assessment of credibility or other review has been performed before transmission to the State Department.

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[151] *See* 8 C.F.R. §§ 208.3(b), 208.9 (1989). Many aliens first express a wish to apply for asylum when the case comes before the immigration judge on "master calendar," a short while after the order to show cause (which initiates deportation proceedings) has been served on the alien. At the master calendar hearing, the alien pleads to the order to show cause and makes known any defenses or applications for relief from deportation. The overwhelming majority of asylum applicants admit deportability; asylum is then usually the only issue in the deportation proceeding.

[152] Technically, an applicant in the immigration court is seeking the benefits of both asylum under INA § 208 and withholding under § 243(h), whereas examiners in the district office can award only asylum under § 208. This distinction makes virtually no practical difference, and Form I-589 is identical in both settings.

It is also possible that an asylum claim will be lodged later in the process. For example, the regulations still provide that an alien be expressly advised of her right to apply for withholding at the time the immigration judge designates a country of deportation. *See* 8 C.F.R. § 242.17(c) (1989). The alien can then receive 10 days to fill out the I-589 and thereby initiate consideration of a persecution claim. *See id.* An alien can also apply for asylum after the issuance of a deportation order by filing a motion to reopen, but the alien then carries the additional burden of explaining the failure to apply earlier. *See* 8 C.F.R. § 208.11 (1989). This burden can be substantial. *See, e.g.*, INS v. Abudu, 485 U.S. 94, 109-110 (1988) (analogizing a motion to reopen to a motion for a new criminal trial on the basis of newly discovered evidence—a motion in which the moving party "bears a heavy burden"). If reopening is granted, the matter will return to the immigration judge for consideration. *See* 8 C.F.R. §§ 103.5, 242.22 (1989).

[153] *See* 8 C.F.R. §§ 208.7, 208.10(b) (1989).

After State's views are received, the case can be calendared for a hearing. The timing varies depending on caseload, but delays of a year are not unknown. Asylum cases receive no priority in calendaring unless the applicant is detained, in which case the judges place a high priority on prompt adjudication. Detention is more likely in exclusion cases than in deportation.[154] The immigration court in New York has worked out arrangements with attorneys to permit time for interviews with clients when the clients are brought in to the court facility in Brooklyn, thus obviating frequent trips to the remote detention facility.[155]

Procedure in court conforms, by and large, to a standard adversarial model of a trial-type proceeding. Most asylum seekers, at least in the districts with high volume, are now represented in immigration court by counsel or accredited nonattorney representatives.[156] The burden of proof is on the alien. Counsel will usually elicit the key particulars of the story from the client on direct examination and will also offer available supporting materials, often derived from the reports of human-rights NGOs such as Amnesty International, Americas Watch, or the International Commission of Jurists.[157] The

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[154] *See* 8 C.F.R. §§ 212.5, 235.3 (1988). The background of the detention policy is set forth in T. Aleinikoff & D. Martin, *supra* note 3, at 722-24. *See also* Amanullah v. Nelson, 811 F.2d 1, 4-8 (1st Cir. 1987); Singh v. Nelson, 623 F. Supp. 545, 556 (S.D.N.Y. 1985) (generally upholding detention of asylum seekers, in part as a deterrent measure). For critiques of detention of asylum seekers, see Helton, *supra* note 116; Levy, *Detention in the Asylum Context*, 44 U. Pitt. L. Rev. 297 (1983).

[155] Detention arrangements bring frequent complaints from applicants' attorneys, particularly when detention is carried out by private contractors, as has sometimes been the case, for example, in New York City. I was told that "these are guys who usually guard construction sites," that some of them "know nothing" about American Correctional Association accreditation standards, and that they often make life quite difficult for attorneys who are simply seeking access to their clients. Interview with Arthur Helton, John Assadi, and Jeff Heller, Attorneys with the Lawyers' Comm. for Human Rights, in New York City (Nov. 15, 1988); *see also* General Accounting Office, Criminal Aliens—INS' Detention and Deportation Activities in the New York City Area 24-27 (1986).

[156] *See* 8 C.F.R. § 292.2 (1988) (providing for accreditation of such representatives). Part 292(e) requires district directors to maintain a list of free legal services programs available in the area. These lists can be somewhat misleading, both because the lists get out of date and because some of the organizations listed have in recent years become more selective in accepting cases.

[157] The closest analogues in this country to the documentation centers used by European adjudicators are the private documentation centers put together by refugee advocacy organizations. Many specialize by region. *See, e.g.*, *New Documentation Center Announced for Salvadoran Asylum Cases*, 60 Interpreter Releases 975 (1983) (reporting on new center, established by the American Civil Liberties Union Fund of the National Capitol Area and the Center for National Security Studies, gathering information on El Salvador). At least one commercial

INS trial attorney then cross-examines. In busy districts, trial attorneys have little time to prepare the cases. Sometimes they are only able to review the file for the first time while direct examination is proceeding. Moreover, trial attorneys are not generally expected to develop extensive additional information or other sources of evidence.

This insufficiency in preparation time and resources results in several disadvantages, which are compounded by the failure to assign clear responsibility for the development of other sources of information. Cross-examination is impoverished under these circumstances. One trial attorney stated ruefully during her interview that she necessarily does what she was always taught in law school not to do: She asks questions when she has no idea where the answers might lead. Sometimes a useful line of inquiry develops. Often it does not. All she can do is probe apparent soft spots and inconsistencies in the story. Given so little to work with, her incentives are to magnify the weaknesses in the testimony even if there might be an innocent explanation.

Second, an early review of the file might have revealed the need for additional and specific information on country conditions. Review on the day of the hearing will be too late, even if the information would have been relatively accessible. An example may be helpful in illustrating this point. Suppose the applicant claims that she fled to avoid forced conscription into the army or a guerrilla unit. Cross-examination can do little to explore whether such dragooning really takes place; it can only probe the wellsprings of this particular alien's belief. If the State Department response said nothing about the issue (perhaps because the initial papers did not make sufficiently clear that this was the basis of the claim), the record may contain no useful general information on this crucial question. The applicant's assertions will therefore stand "uncontroverted," whatever may be the real state of affairs in the home country. BIA member Michael Heilman expressed particular concern about this inadequacy, especially given the Board's strict adherence to the requirement that decisions be based on evidence of record in the particular proceeding.[158]

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organization has become involved. The Data Center in Oakland, California recently mailed a brochure to members of the American Immigration Lawyers Association advertising its Political Asylum Documentation Service, available for $50 per hour of search time, plus photocopying and postage.

[158] Telephone interview with Michael Heilman, Member, Board of Immigration Appeals (Sept. 22, 1988).

Some trial attorneys also reflected thoughtfully on the wider implications of applying the adversarial system to these matters. The government's real interest will not always be to oppose the claimant; some of the applicants deserve asylum. But the INS attorney may have little idea which type of case is before her until well into the proceedings. Moreover, as one attorney told me, even when it appears to be a strong case, her instincts (and perhaps her inevitable role under this structure) lead him to react in a particular way: "When it's there in the courtroom, I'm 'agin' it."[159]

There are currently seventy-five immigration judges. As Table III indicates, asylum cases have risen from ten percent of immigration court caseload in 1985 to over thirteen percent in 1988. Because asylum cases tend to present the most difficult and challenging issues appearing in a judge's caseload, however, they occupy a much higher percentage of actual work time. Statistics on dispositions have only recently been maintained. In fiscal year 1988, immigration judges received 11,025 new asylum cases and disposed of them as follows: 1,647 cases were granted (representing 2,276 individuals); while 5,626 were denied. The overall grant rate was twenty-three percent. A total of 4,364 cases were pending in immigration courts at year's end.[160]

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[159] Interview with former trial attorney, in New York City (Nov. 14, 1988).

[160] EXECUTIVE OFFICE FOR IMMIGRATION REVIEW (EOIR), ASYLUM STATISTICS [IMMIGRATION JUDGES] FOR PERIOD 10/1/87-10/1/88. The slight discrepancy between these numbers for asylum cases received and those in Table III is unexplained. Until very recently, EOIR published only limited statistics on asylum cases and did not reveal grant and denial rates by nationality. In the spring of 1989, however, it decided to compile such figures and make them available to the public. They show, for example, a noticeably higher grant rate for Salvadorans (12 percent) and a lower one for Nicaraguans (37.4 percent) than the comparable rates in the INS district offices, which are shown *supra* Table II following note 150. The complete set of EOIR statistics, with details by nationality, appears in REFUGEE REPORTS, May 19, 1989, at 5.

TABLE III
CASES RECEIVED, IMMIGRATION JUDGES

Fiscal Year	Deportation	Exclusion	Motion to Reopen	Total[a]	Asylum Cases[b]	Percent Asylum
1985	102,044	9,122	3,521	114,687	11,663	10.2%
1986	89,680	9,576	3,555	102,811	11,156	10.9%
1987	64,133	9,178	2,711	76,022	8,659	11.4%
1988	71,308	10,167	2,387	83,862	11,200	13.4%
1989	118,906	14,020	2,398	135,324	20,331	15.0%

[a] Immigration judges also hear a fourth category of cases, involving release on bond. But because asylum is not an issue in such proceedings, these totals omit that category in order to obtain a meaningful base for comparison.

[b] EOIR does not break down asylum receipts according to the type of procedure (deportation, exclusion, motion to reopen) in which the application is received. The percentage is therefore stated as a portion of total combined caseload in those three categories for the year.

Source: Telephone interviews with Gerald Hurwitz, Counsel to the Director, EOIR (Mar. 8, 1989, Mar. 28, 1990).

3. State Department Role

The State Department is required by statute to publish annual reports on human rights conditions in all foreign countries.[161] This requirement derived from congressional efforts to strengthen human rights policy during the Kissinger era at the State Department, rather than from any concern for asylum proceedings. Nevertheless, the reports have proven to be extremely useful in asylum adjudications, both in the United States and around the world. Every district office asylum unit and every immigration judge receives a copy, and I have seen well-thumbed issues in the offices of asylum adjudicators in Western Europe and Canada—and indeed in the offices of UNHCR and refugee advocacy organizations.

The controversial portion of the State Department's role relates to its preparation of advice letters in individual asylum cases. The Bureau of Human Rights and Humanitarian Affairs (BHRHA) performs the central functions in the asylum advice process. Its asylum unit, headed by a career foreign service officer, is largely staffed by retired foreign service officers, doing part-time work under contract. Such officers are able, to a considerable extent, to specialize by region of origin. In the summer of 1988, for example, one officer assumed responsibility for claims from Eastern Europe and some

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[161] *See* 22 U.S.C. § 2151n(d) (1988).

East Asian countries. Another concentrated on the Near East and South Asia. Three officers were responsible for Central and South America.

When files arrive from either district offices or immigration courts, they are logged into a central bureau computer and assigned to the appropriate officer for review. Until early 1988, BHRHA returned an opinion letter in each case, many of them standard form letters, announcing whether the Department believed that the particular applicant had a well-founded fear of persecution.[162] In almost all cases, BHRHA officers have initially drafted the letters after simply reading through the file. Very few cases have stimulated further specific research. After drafting, the letter is cleared with the appropriate country desk in the regional bureaus of the State Department. Critics have sometimes targeted the regional bureaus as the source of political bias in the letters. State Department officials, however, deny that diplomatic commitments to other nations have ever entered into the advice-letter process.[163] Moreover, as the number of cases has expanded, the regional bureau clearance process has become more and more routine. Apparently, regional bureaus often grant blanket clearances, relying on the BHRHA officer to bring any unusual cases requiring more thorough scrutiny to their attention.

In February 1988, State introduced a new system. INS and EOIR still send all files to State as before, but the Department no longer invariably returns an advice letter. Instead, its response takes one of three forms. First and most common, a sticker is affixed to the returning papers, stating that the Department has nothing to add and referring generally to the latest human rights country reports.[164] Second, the officer might return the file without an individualized communication, but instead with a general update sheet. Those sheets report, for example, a change of government since the last country report was written, or provide more detailed information than the country report about specific issues (such as the treatment of a particular religious group or punishments for those who left the country without exit permission). Third, the Department still sometimes returns a more detailed advisory letter in cases where it has something specific to add.[165]

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[162] Form letters have often drawn criticism, but volume made such an approach virtually unavoidable. *See generally In re* Vigil, Interim Dec. No. 3050, slip op. at 12 (BIA Mar. 17, 1988) (finding form deportation letter not to constitute an error because it is not binding and immigration judge may determine weight it deserves).

[163] *See* Burke, *Compassion versus Self-Interest: Who Should Be Given Asylum in the United States?*, 8 FLETCHER FORUM 311, 320-22 (1984); Dietrich, *supra* note 141, at 67-72.

[164] The text of the sticker is reprinted in 8 AILA MONTHLY MAILING 118 (1989) (reporting further on INS cable clarifying that no "notice of intent to deny" is necessary when the State Department responds with a sticker). Because examiners apparently tended to treat stickers as negative opinions, INS recently had to send further guidance to its offices emphasizing that stickers are not to be considered as "adverse evidence." 66 INTERPRETER RELEASES 351 (1989).

The new sticker system has received mixed reviews. Several people interviewed, including William Robie, the Chief Immigration Judge, find the change a big improvement.[166] The stickers make it clearer than the old form letters did that the Department has nothing to add. It is then more clearly left to the immigration judge to decide based on the record—which can include the annual State Department country report and any generic update sheets that are available. Others, especially district office examiners, but also some immigration judges, regard the stickers as a dereliction of duty; they want more guidance from State. One State Department officer (who also dislikes the sticker system) reported frequent receipt of files from district offices with a marking on the cover sheet: "No sticker."[167]

Asylum applicants have frequently challenged the use and accuracy of State Department letters, or have sought access to their authors for cross-examination. Although some letters have drawn sharp judicial criticism,[168] by and large the courts have approved the practice, even in the immigration court setting.[169] In one such case, Judge Henry Friendly, in dictum, advised certain changes that would minimize any due process problems arising from introduction of the letters without making their authors available for cross-examination. In the future, she recommended, such letters should be confined to dealing with "legislative facts" such as the extent of persecution in the home country, and refrain from recommending an outcome in the specific case. If so modified, Judge Friendly suggested, they would deal with matters "on which the safeguards of confrontation and cross-examination are not required and on which the IJ needs all the help she can get."[170] For roughly 13 years after Judge Friendly's admonition, the Department persisted in sending letters that commented on the specific case, i.e., on adjudicative facts. The new sticker system (ironically, adopted primarily for budgetary reasons) now brings practice more in line with the scheme Judge Friendly envisioned.

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[165] *See* 53 Fed. Reg. 2893 (1988) (notice announcing the new system).

[166] Interview with William Robie, in Falls Church, Va. (Aug. 12, 1988).

[167] Interview with Christopher Squier, in Washington, D.C. (Aug. 12, 1988).

[168] *See, e.g.*, Paul v. INS, 521 F.2d 194, 199-200 (5th Cir. 1975); Kasravi v. INS, 400 F.2d 675, 676-77 & 677 n.1 (9th Cir. 1968).

[169] *See, e.g.*, McLeod v. INS, 802 F.2d 89, 95 n.8 (3d Cir. 1986); Hotel and Restaurant Employees Union, Local 25 v. Smith, 594 F. Supp. 502, 510-14 (D.D.C. 1984), *aff'd by an equally divided court*, 846 F.2d 1499 (D.C. Cir. 1988). For BIA descriptions of the appropriate use of State Department advice, see *In re* Vigil, Interim Dec. No. 3050, slip. op. at 12 (BIA Mar. 17, 1988); *In re* Exilus, 18 I. & N. Dec. 276, 278-80 (1982).

4. Administrative Review

a. *The Board of Immigration Appeals*

There is no appeal from the district office decision, although renewal in immigration court obviously provides an opportunity to secure relief if the original denial was unjustified. Decisions in immigration court, however, are appealable to the Board of Immigration Appeals (BIA), under the standard procedures allowing review of decisions in exclusion and deportation cases. Both the applicant and the INS can appeal, although appeals by the latter are far less frequent.

The Board, created by Justice Department regulations rather than by statute, consists of five members and conducts business at its headquarters in Falls Church, Virginia. It hears appeals in exclusion and deportation cases, and also reviews a variety of other immigration-related decisions.[171] Exact statistics are unavailable, but informed guesses place asylum at about one-quarter of the BIA's caseload. Owing to their greater complexity, however, asylum cases occupy about half its work-time.

To cope with a rising workload, new regulations, enacted in 1988, authorized temporary assignments of immigration judges to sit with the Board, and for the first time allowed consideration of cases by three-member panels.[172] Oral argument is possible if the Board approves, but such approval remains rare. It is far more common for the Board to consider the matter on the briefs alone. Each appeal is decided by opinion, but only a small fraction of those opinions are published as precedent decisions.[173] The BIA appeal process can consume considerable amounts of time, although precise statistics are not maintained. The greatest delays derive from backlogs in typing the transcript of the hearing; periods of eight to twelve months are not uncommon. The Board then requires several additional weeks or months before issuing a decision.[174] Cases involving an applicant in detention, however, receive priority. In these instances, the transcript can be prepared in a matter of weeks, and the Board will also expedite its own decision process.

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[170] Zamora v. INS, 534 F.2d 1055, 1062 (2d Cir. 1976).

[171] *See* Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process,* 71 Iowa L. Rev. 1297, 1302-10 (1986).

[172] *See* 53 Fed. Reg. 15,659 (1988) (codified at 8 C.F.R. § 3.1(a)(1) (1989)).

[173] For a useful look at BIA practice, see Note, *A Refugee by Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases,* 75 Va. L. Rev. 681 (1989).

TABLE IV

CASES RECEIVED, BOARD OF IMMIGRATION APPEALS

Fiscal Year	Total Cases
1985	4,911
1986	8,608
1987	8,204
1988	10,191
1989	11,186

Note: The EOIR computer system did not separately code asylum appeals before 1989, but observers agreed that asylum cases are appealed more often than other decisions by immigration judges. The percentage of asylum cases should thus be considerably higher than the percentage of receipts for immigration judges, *supra* Table III following note 160.
Source: Telephone interviews with Gerald Hurwitz, Counsel to the Director, EOIR (Mar. 8, 1989, Mar. 28, 1990).

b. *The Asylum Policy and Review Unit*

The Asylum Policy and Review Unit (APRU) was established in the Office of Legal Policy of the Department of Justice in 1987, at least partly in response to the Medvid incident (the forcible return of a Ukrainian seaman to a Soviet ship docked in Louisiana).[175] Its genesis also reflects the dissatisfaction of the Justice Department under Attorney General Meese with the tenor of the handling of certain cases by the State Department and INS. An APRU official complained, for example, that State failed to stay sufficiently "up to date" on developments in some countries.[176] Critics of APRU provide a harsher assessment of its origin. They believe it was created to assure a higher grant rate for persons fleeing Eastern Europe or other Marxist countries—apparently a matter of strong concern to the Department under Mr. Meese.[177]

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[174] *See* Legomsky, *supra* note 171, at 1331 (reporting rough estimate of three months' mean for BIA disposition—presumably from the time the BIA actually receives the case; that is, after the transcript and briefs are received). Transcript delays are so costly that the system should explore other means of presenting an adequate record on appeal. For an innovative suggestion of using videotapes for these purposes in asylum cases, see E. RATUSHNY, *supra* note 64, at 57-58.

[175] The regulation officially establishing the Unit appears at 52 Fed. Reg. 11,043 (1987) (codified at 28 C.F.R. § 0.23b (1989)). *See also New Asylum Policy and Review Unit Created*, 64 INTERPRETER RELEASES 439-40 (1987); *Attorney General Announces New Asylum Policy Unit*, 64 INTERPRETER RELEASES 472-73 (1987).

APRU receives the whole file in every case denied in the district offices, and a copy of the approval letter in granted cases. Either way, APRU almost always receives the material after the alien has been notified of the result. The office carefully keeps its distance from cases being considered in EOIR (by the immigration judges or the BIA), in order to honor the latter's quasi-judicial independence. In a handful of cases, apparently, an applicant rejected in EOIR has been given a new round of review in the district office as a result of APRU concern. APRU is not strictly an appellate body. Asylum applicants do not initiate its consideration, although knowledgeable lawyers are now becoming more aware of the office's role and of course cannot be prevented from writing with concerns about allegedly unjustified denials.

Most of APRU's review work is performed by three attorneys in the office. If they believe an application was improperly denied, or spot trends indicating undue restrictiveness with respect to certain groups, APRU makes its concerns known to the Central Office of INS. Sometimes this results in reopening and correction in the district office. At the time of interviews (July 1988), however, the Deputy Director expressed concern about whether messages communicated in this way adequately get through to the districts. She further described APRU's role as a "safety valve," assuring that persons at risk are not wrongfully sent home; the office's individual case review serves mainly to spot egregious cases. About forty such cases had been pursued with vigor in the district offices.[178] INS, however, believes that APRU's functions are duplicative, and INS

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[176] Interview with Robert Charles Hill, Deputy Director, APRU, in Washington, D.C. (July 28, 1988).

[177] *See, e.g.*, Pear, *supra* note 40 (reporting on the consideration of regulations that would provide a presumption favoring asylum for persons from "totalitarian" but not from "authoritarian" countries; the proposal later drew considerable criticism and was never officially made public).

[178] Interview with Robert Charles Hill, Deputy Director, APRU, in Washington, D.C. (July 28, 1988). As of April 5, 1989, the Director reported: "APRU has worked with INS to obtain the reversal on approximately 40 cases. In another approximately 40 cases, no agreement could be reached with INS, and APRU recommended, and the Deputy Attorney General approved, grants of asylum. In addition, approximately 50 cases are currently being discussed by APRU with INS." Letter from Henry L. Curry to David A. Martin (Apr. 5, 1989).

Commissioner Nelson urged Attorney General Thornburgh to abolish the office, allowing INS to allocate APRU's annual budget to other parts of the adjudication system.[179]

5. Judicial Review

Applicants ordinarily secure judicial review of asylum denials in accordance with the regular arrangements for review of exclusion or deportation orders under INA § 106.[180] Exclusion cases therefore proceed to district court on a habeas corpus petition; deportation cases are heard in the court of appeals based on a petition for review. In practice, this distinction makes little or no difference in the operative scope of review. Courts review denials of the mandatory protections of § 243(h) to check that the ruling was based on "substantial evidence."[181] Denials of asylum under § 208 are subject to a bifurcated standard of review. The "substantial evidence" test applies to factual determinations that underlie the judgment as to whether the person has a well-founded fear of persecution, but if asylum is denied in the exercise of discretion, that denial is reviewed only for "abuse of discretion"—intended as a more deferential standard.[182] Whatever the precise formula, the actual vigor of scrutiny covers a wide range, from highly deferential to highly demanding.[183]

Deportation is automatically stayed once a petition for review is served on INS.[184] Stays are not automatic in exclusion cases or while a motion to reopen is pending, but in light of the possible effects of an erroneous removal, district courts have been quite hospitable to the issuance of a stay.[185] Given federal court caseloads, pursuing judicial review can considerably lengthen an applicant's stay in the United States. But as Table V indicates, only a small proportion of asylum applicants pursue direct review in court. The information in the Table is somewhat misleading, however, as class actions or other suits seeking broadly applicable injunctive relief, rather than direct review in single cases, have provided the setting for some of the most important judicial rulings on asylum processing.[186] Some of these cases have resulted in multi-year stays of removals and in orders necessitating reopening of hundreds of proceedings. The Director of the Justice Department's Office of Immigration Litigation reports that asylum issues "take a huge portion of our time."[187]

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[179] *See* 66 Interpreter Releases 3 (1989) (asserting that from Apr. 1987 through Dec. 1988, APRU cost the INS appropriation $750,000).

[180] 8 U.S.C. § 1105a (1988). Some cases appear to hold open the possibility of judicial review in district court under the Administrative Procedure Act (APA) of denials in the district office, but the better view postpones court consideration until immigration court and BIA remedies have been exhausted. *See, e.g.*, Chen Chaun-Fa v. Kiley, 459 F. Supp. 762, 765 (S.D.N.Y. 1978).

[181] *See, e.g.*, Chavarria v. Department of Justice, 722 F.2d 666, 670 (11th Cir. 1984); McMullen v. INS, 658 F.2d 1312, 1316-17 (9th Cir. 1981). *But see* Marroquin-Manriquez v. INS, 699 F.2d 129, 133 (3d Cir. 1983) (stating that an "abuse of discretion" standard should be used, because of the "necessary application of expertise in the determination that a fear of persecution is well-founded"), *cert. denied*, 467 U.S. 1259 (1984).

[182] *See, e.g.*, Cruz-Lopez v. INS, 802 F.2d 1518, 1519 n.1 (4th Cir. 1986); Vides-Vides v. INS, 783 F.2d 1463, 1466 (9th Cir. 1986); Carvajal-Munoz v. INS, 743 F.2d 562, 567-68 (7th Cir. 1984).

[183] *Compare* Turcios v. INS, 821 F.2d 1396, 1399 (9th Cir. 1987) *and* Damaize-Job v. INS, 787 F.2d 1332, 1338 (9th Cir. 1986) (close review of immigration judge's credibility rulings) *with* Diaz-Escobar v. INS, 782 F.2d 1488, 1492 (9th Cir. 1986) *and* Sarvia-Quintanilla v. INS, 767 F.2d 1387, 1395 (9th Cir. 1985) (great deference to agency's credibility determinations).

[184] *See* INA § 106(a)(3), 8 U.S.C. § 1105a(a)(3) (1988).

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[185] *See, e.g.*, Bazrafshan v. Pomeroy, 587 F. Supp. 498, 501 (D.N.J. 1984) (stating that we "cannot let the rigors of administrative procedure reshape our ideas about life and death").

[186] *See* cases cited *supra* note 3.

[187] Telephone interview with Robert Bombaugh, Director of the Justice Department's Office of Immigration Litigation (Mar. 8, 1989).

TABLE V
DIRECT REVIEW IN FEDERAL COURT

Fiscal year	Total applications for review	No. presenting asylum issue	Percent asylum
	Deportation[a]		
1984	425	116	27.3%
1985	427	116	27.2%
1986	396	115	29.0%
1987	161	43	26.7%
1988	179	49	27.4%
1989	275	120	43.6%
	Exclusion[b]		
1984	18	3	16.7%
1985	25	19	76.0%
1986	19	7	36.8%
1987	18	6	33.3%
1988	12	9	75.0%
1989	66	57	86.4%

[a] These statistics probably undercount asylum cases. Petitions for review are logged in on the Office of Immigration Litigation OIL statistical system at the time of filing, but it may not be apparent until later stages that an asylum issue is presented. An effort is made to go back and correct or amplify the entries, but a few cases are overlooked in the process. That correction process is still underway for the most recent fiscal years; it is therefore likely that those years' asylum statistics will rise, perhaps substantially.

[b] Exclusion cases are almost certainly undercounted. Review is obtained by petition for habeas corpus in the district courts, and the local U.S. Attorney's office represents the government. Not all such offices report full statistics to OIL.

Source: Telephone interviews with Robert Bombaugh, Director of the Office of Immigration Litigation, Dept. of Justice (Mar. 8, 1989, May 10, 1990).

6. Actual Deportations

It is difficult to obtain precise information on actual removals of unsuccessful asylum seekers, but by all accounts, the numbers are quite low. A 1984 GAO study found final deportation orders issued in only 3.5 percent of cases of persons initially denied asylum, and over half of those individuals apparently had not yet been removed. Another one percent had left on their own. Although a very high percentage of the sample of 21,032 aliens were in an uncertain status (and some might have left), these numbers are disturbing, particularly because actual deportations are essential to send any kind of deterrent message to persons in the home countries contemplating a journey to the United States to apply for asylum.[188]

Deportations falter at two stages. First, applicants denied asylum in the district office will receive orders to show cause (thus initiating deportation proceedings) only if the investigations section completes the paperwork. These sections are overburdened, and failed asylum applicants do not occupy a high enforcement priority. Second, when a deportation order becomes final, the respondents are usually promptly served with a notice to leave the country. But if they fail to do so, enforced deportation will occur only if INS takes the initiative to locate and apprehend the person. Again, failed asylum seekers occupy a low enforcement priority.[189]

There are exceptions to these patterns. If the individual is held in detention, a final deportation or exclusion order will almost always result in prompt removal. Moreover, several officers in district offices reported to me that voluntary surrender for deportation picks up just before holidays. Apparently, the individuals are ready to go home, and they present themselves to INS because the agency is likely then to pay the costs of transportation. It is not surprising that such behavior by unsuccessful asylum applicants evokes cynicism on the part of the officers.[190]

7. The Role of the UNHCR

In the late 1970s, the State Department made arrangements with UNHCR for its review of all Haitian asylum applications, then the most controversial portion of its caseload. If UNHCR disagreed with a draft State advice letter, it raised its concerns with BHRHA and a negotiating process ensued before the final letter was sent. Sometimes the Bureau persuaded UNHCR to change its views. In all other cases of initial disagreement, the State Department accepted the UNHCR position.[191]

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[188] *See* General Accounting Office, *supra* note 150, at 25; P. Fagen, *supra* note 141, at 54-55. The problem is by no means confined to asylum cases. Other studies have noted the general inability of the INS system to secure actual deportations. *See* E. Harwood, *supra* note 66, at 41-46. In 1986, INS also changed the regulations to eliminate the 72-hour advance notice to surrender for deportation given to aliens already subject to a final deportation order, in part because an INS study found that more than 76 percent of recipients absconded after receiving such letters (often known familiarly as "bag and baggage" letters or, even more familiarly, as "run letters"). *See* 51 Fed. Reg. 3471 (1986) (to be codified at 8 C.F.R. § 243.3) (proposed Jan. 28, 1986); *id.* at 23,041-42 (1986) (codified at 8 C.F.R. § 243.3 (1989)).

[189] *See generally* E. Harwood, *supra* note 66, at 30, 122-30, 184 (discussing enforcement practices).

[190] *See id.* at 41-46 (reporting the same phenomenon). Harwood recounts the story of one alien who showed up two days before the date shown on her "bag and baggage" letter for deportation to El Salvador. The INS office made her wait. One officer explained: "What they have to realize is that deportation is a privilege, not a right." *Id.* at 46.

Although there have been frequent calls for expanding this practice to cover all asylum cases, during the 1980s the trend went in the opposite direction. The Reagan administration took a more skeptical stance toward international organizations (to put it mildly), and UNHCR's access declined.[192] Although the Washington office retains some contact with State and INS to communicate its general views on, for example, proposed regulations, its role as systematic reviewer of individual cases has long since ended. It now performs three other functions: (1) helping asylum seekers, on occasion, to locate pro bono counsel; (2) filing amicus curiae briefs in cases (usually class actions) likely to have wide impact on asylum processing; and (3) sending a letter to applicant's counsel expressing UNHCR views on the particular application. UNHCR receives far more requests for the last service than it can possibly meet. It tries to be selective and write such a letter only in strong cases, and only at the stage when the matter is already before an immigration judge. It is then up to counsel to introduce the letter in an appropriate manner into the immigration court proceedings.[193]

8. The August 1987 Proposed Regulations

Throughout the 1980s, INS has been considering further reforms to the asylum process to make it more expeditious and effective. The most thorough effort at crafting reforms was built upon an internal study carried out by Richard Spurlock, a retired district director hired as a consultant for these purposes in 1985. Because of the sensitivity of the issues, the potential costs, and the multiple agencies involved, each with its own particular angle of vision and bureaucratic turf to protect, the proposals did not result in formally promulgated draft regulations until August 1987.[194]

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[191] *See U.S. Refugee Programs: Hearing before the Sen. Comm. on the Judiciary,* 96th Cong., 2d Sess. 15 (1980) (testimony of Cyrus Vance, Secretary of State). Secretary Vance expressed satisfaction with this arrangement and stated: "[t]his doublecheck which we have developed by working with the U.N. High Commissioner is a sensible and wise way of checking our standards and seeing that they are being fairly applied." *Id.*

[192] *See* Burke, *supra* note 163, at 325 (presenting argument of one official of the Reagan Administration against UNHCR participation in asylum adjudication because determining who may stay "is a fundamental attribute to sovereignty").

[193] An example of such a letter may be found in Dwomoh v. Sava, 696 F. Supp. 970, 979 (S.D.N.Y. 1988).

Those proposed rules ranged widely and contained some improvements broadly supported. But the central change touched off a storm of controversy. The regulations proposed to establish a new corps of asylum adjudicators in INS, responsible to the Central Office's Office of Refugee Asylum and Parole, which would consider all asylum issues, no matter at what stage of the proceedings the asylum claim was filed.[195] The immigration judges would have been removed from asylum issues altogether, thus ending the provision of two possible rounds of de novo consideration.

If the alien were already in deportation or exclusion proceedings at the time of the asylum claim, those proceedings were to be adjourned to permit consideration of the case by the new adjudicators. The State Department was to receive a copy of all asylum applications and retained the option of communicating its views to the adjudicators, but the proposal probably would have led to a reduced role for the Department. If asylum was denied, the matter would return to the immigration court for consideration of any other defenses, and for issuance of a final deportation or exclusion order. Under the proposed regulations, the immigration judge had no authority to reconsider the asylum claim. The alien could still appeal to the BIA, however, and the Board retained authority to review the adjudicator's asylum decision.

These regulations evoked a strong reaction from refugee advocates. Although some had earlier expressed openness to the idea of a single corps of expert adjudicators, all were deeply concerned about the adjudicators' lack of independence under the August draft. The asylum office was to remain in INS, instead of being moved to EOIR or a wholly new independent agency. More over, initial indications about staffing and training held little promise of significant upgrading in the quality of personnel or procedures over that already in the district offices.[196]

Although some comments filed in response to the rulemaking suggested measures that would address these concerns directly, while retaining the basic idea of a single round of adjudication before a specialized set of adjudicators, NGO opposition soon focused with vigor on one particular cure: reinstatement of the opportunity for de novo consideration by the immigration judges. The campaign was so intense that the matter moved directly to the desk of the Deputy Attorney General, who decided to accede to the NGO position. On the day the comment period closed, the Justice Department told the press that new regulations would issue reinstating the judges in the process.[197] Finally, in April 1988, new proposed regulations appeared, implementing this decision, but continuing with plans for a centralized corps of adjudicators to replace the district office examiners.[198] To date, continuing internal disputes have prevented final promulgation.[199]

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[194] *See* 52 Fed. Reg. 32,552 (to be codified 8 C.F.R. pts. 3, 208, 236, 242, 253) (proposed Aug. 28, 1987).

[195] *See id.* Although the regulations did not so state, INS initially envisioned stationing these officers in seven or eight cities throughout the country, with some provision for "circuit riding" to hear claims lodged in more remote locations.

[196] *See* Helton, *The Proposed Asylum Rules: An Analysis*, 64 INTERPRETER RELEASES 1070, 1073-74 (1987).

C. *Evaluation*

Almost no one regards the current asylum adjudication system as an effective and efficient scheme for deciding on what Judge Kenneth Starr (now Solicitor General) has called "this most sensitive of human claims in the international community."[200] If accuracy, speed, and fairness are the key objectives in asylum adjudications, the current system achieves them in only a small portion of cases.

1. Speed and Fairness

a. *Two Bites at the Apple*

Despite nominal agreement on all sides that expeditious proceedings are needed, the current system rarely achieves prompt finality. The most obvious culprit is the wasteful provision of two venues for de novo rulings in asylum—exactly the problem targeted in the August 1987 proposed rules.[201] Those rules, of course, met with such strong opposition that the Justice Department beat a hasty retreat and reinstated the role of the immigration judges in revised proposed regulations issued in April 1988. But the nature of the objections, the proposed remedy of the NGOs, and the Administration's ultimate response merit further inquiry.

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[197] *See* Arocha, *Political Asylum Revision Dropped*, Wash. Post., Oct. 30, 1987, at A23, col. 1. This was followed by a formal announcement to this effect in the Federal Register in December. *See* 52 Fed. Reg. 46,776 (to be codified 8 C.F.R. pts. 3, 208, 336, 242, 253) (proposed Dec. 10, 1987).

[198] *See* 53 Fed. Reg. 11,300 (to be codified 8 C.F.R. pts. 3, 208, 236, 242, 253) (proposed April 6, 1988); Helton, *Asylum Rules Revisited: An Analysis*, 65 INTERPRETER RELEASES 367 (1988).

[199] *See, e.g.*, 66 INTERPRETER RELEASES 3 (1989) (suggestion by INS Commissioner that asylum adjudication function should remain in the district offices as before).

[200] Reyes-Arias v. INS, 866 F.2d 500, 504 (D.C. Cir. 1989).

[201] *See* Kurzban, *Restructuring the Asylum Process*, 19 SAN DIEGO L. REV. 91, 98, 111-12 (1981).

Most of the opposition to the August 1987 proposed rules derived not from a belief that the immigration court provides the ideal setting for consideration of asylum claims. Indeed, the judges are often criticized in other venues, on a variety of grounds, by the same people who attacked the 1987 proposal. The opposition derived instead from concern about the quality of decision-making that could be expected under the precise form of unification that was proposed. The centralized corps of asylum adjudicators, who would have become the sole arbiters, would not likely have been much different, in training, background, or outlook, from the current examiners who make the decisions in the district offices. Opponents of the new regulations were able to collect affidavits with numerous stories of brusqueness, mishandling, errors, and apparent bias on the part of some of those officials.[202]

Early internal versions of what became the 1987 proposed regulations had considered assigning the newly centralized adjudication function to a different set of officials—attorneys at a higher civil service rank. But the Administration ultimately chose instead a version that would keep the position one for journeyman immigration examiners, and OMB initially assigned to the new positions, a relatively low grade (relative, that is, to the magnitude and challenge of the adjudication required) of GS-11 and GS-12 for supervisors. The administration decided, in short, to attempt reform on the cheap, by shifting boxes on the organization charts rather than investing adequately in a new system and new personnel that might break through the established, and destructive, patterns of polarization and distrust that have paralyzed effective reform for years. The vigorous reaction from the NGO community should not have been a surprise, given that the adversarial forum was being replaced with such a stingy alternative.

Some old government hands in the immigration field, familiar with the shifting patterns of NGO advocacy over the last fifteen years—sometimes favoring nonadversarial procedures, sometimes treating the immigration judges as indispensable—conclude that the position of the NGOs is always and only a tactical one, meant to preserve "two bites at the apple" whatever the proposal on the table. But to be fair, there is no inherent inconsistency in the advocates' position. If speed were no concern, it might well be that the best possible system does involve two rounds of de novo consideration in different institutional settings: first a nonadversarial hearing to foster responses from hesitant or fearful applicants, followed by an adversarial, trial-type hearing that we traditionally identify as the best way to honor due process when the stakes for the individual are high.[203] Arthur Helton, a leading figure in the asylum debates, stated forcefully during her interview for this study that the fight over the 1987 regulations has left the NGO community deeply committed to "bifurcated proceedings," that is, to a system that allows two separate forums for initial, de novo consideration.[204] NGOs will probably resist stoutly any departure from the victory they feel they justifiably won in October 1987.

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[202] *See supra* note 144; *see also* Note, *Asylum Adjudication: No Place for the INS,* 20 COLUM. HUM. RTS. L. REV. 129, 143-44 & n.104 (1988) (arguing that "[t]he impartiality of the INS as an adjudicatory authority is compromised by the emphasis on enforcement which pervades the entire agency and by the direct effect this mentality has on decision-making").

But here is the rub: Speed is a concern, a vital concern. It must come to be seen as such by the NGOs as well as government officials, including high level Justice Department officials who step in on immigration matters only when political controversy burns high. Without speedy denials, the system will either attract large numbers of marginal claimants or else force resort to other costly and troublesome deterrents which indiscriminately burden genuine refugees. Restoring the "two bites" system thus implicated far greater costs than were appreciated in October 1987, by either the NGOs or the Justice Department.

b. *Administrative and Judicial Review*

Delay also derives from the clogged dockets of the immigration courts and from backlogs at the BIA. Shortening those delays requires additional resources, rather than major institutional redesign,[205] and remains within the general control of the Justice Department, provided, of course, it receives adequate appropriations.

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[203] *See* Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. Rev. 1141, 1145 (1984) (identifying Goldberg v. Kelly, 397 U.S. 254 (1970), which imposed extensive requirements for trial-type hearings, as the "high watermark of procedural due process in the administrative setting").

[204] Interview with Arthur Helton, in New York City (Nov. 15, 1988).

[205] The recent rules changes allowing the BIA to sit in panels of three should help reduce that backlog. *See* 8 C.F.R. § 3.1(a)(1) (1989).

(This is a powerful proviso, of course, in these days of Washington lip-reading.) One particularly important element in the delay, however, derives from the lengthy period of time required to obtain transcripts of immigration court proceedings. That period can now run eight months or more, although cases involving detained aliens are given priority and can be processed within a matter of weeks. If expeditious final rulings are to be received, EOIR must either arrange for a quicker turnaround of transcripts or else experiment with alternatives to full transcription of each hearing.[206]

Major delay also potentially derives from the provisions for judicial review, although this does not appear to affect a significant proportion of cases at present. Several refugee attorneys stressed during interviews that judicial review is sought only if the case appears particularly strong—in part because of the pro bono nature of the representation, and in part because such attorneys worry about developing bad law that would serve to undermine stronger cases later. This practice thus contrasts importantly with the use of other stages of the process, because immigration attorneys, I was told, consider renewal of asylum cases in immigration court and administrative appeals to the BIA to be routine steps in all but the most farfetched cases.

Changes to the judicial review provisions would therefore not appear to be warranted at this time. If these patterns change, and judicial review someday comes to cause delay in a far higher percentage of cases, then reform could be considered at that point. Statutory changes would then be needed. Other nations confronting the problem of judicial delay have tried two approaches: (1) by speedily identifying a class of applications adjudged "manifestly unfounded" and strictly limiting judicial review for that class; and (2) more ambitiously, by limiting the scope of judicial review in virtually all asylum cases to a summary proceeding that is highly deferential to the administrative outcome, but affords some opportunity for judicial correction of gross error or abuse. These approaches will receive greater, albeit preliminary, attention below in connection with proposed reforms.

c. *Is Delay Really a Problem?*

Before turning to the alternative approaches, however, one further set of objections to the above evaluation should be aired. Refugee advocates sometimes argue that the problems of administrative and judicial delay are exaggerated. They agree that the current system allows, at least theoretically, for six layers of consideration (three administrative and three judicial) in exclusion cases, and five in deportation cases, but they point to the absence of statistics showing that many asylum seekers actually avail themselves of all these opportunities.[207]

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[206] A Canadian study has recommended the use of videotapes, with briefs citing the location on the tape where crucial matters appear. *See* E. Ratushny, *supra* note 64, at 57-58.

It is certainly true that the case for administrative simplification cannot be made convincingly on the basis of currently available statistics. EOIR maintains and releases only limited statistics on asylum caseloads, and it is impossible to tell how many of its asylum cases represent renewals of applications initially rejected in the district offices.[208] The GAO study based on 1984 applications found that only seven percent of applicants denied in the district office renewed their claims before the immigration judges.[209] But this statistic is suspiciously low, and may be attributable to the fact that time limitations on the study precluded the GAO from tracking all of the cases initially denied through to the applicants' actual removal from the country or to some other resolution of their status. It would be entirely possible that many aliens involved simply were not processed for deportation until after the study period ended, particularly because the study found a low INS priority on initiating such deportation cases.[210] Everyone interviewed for the present study—including immigration lawyers—thought that the seven percent figure was too low, although most placed their rough guesses of actual renewals in the 20-30 percent range, an estimate still not terribly high. Similarly, judicial statistics (again limited) do not show massive court litigation over asylum.[211]

These statistics, however, almost certainly tell a dated story. Before the full implementation, in 1988, of sanctions on employers who hire undocumented aliens,[212] persons denied asylum in the district office had little incentive to pursue matters further. Most could probably find work and enjoy the benefits of a "de facto asylum" that carried few risks, despite their undocumented status.[213] Such aliens had no reason to rush further review, because they always retained the option of renewing the asylum application in immigration court if and when the INS caught up with them and initiated deportation proceedings. Moreover, because of enforcement priorities, deportation has not been an imminent threat.

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[207] *See,* Kurzban, *supra* note 201, at 96-97.

[208] It may be that the more complete EOIR statistics being released as a result of a policy change in early 1989 will someday provide greater insight into these issues. *See supra* note 160.

[209] GENERAL ACCOUNTING OFFICE, *supra* note 150, at 20, 33. At the time of the study, 77 percent of the claims had been filed only in district offices and 16 percent only in immigration court.

[210] *See id.* at 27-29 (describing methodology), *id.* at 38 (showing that for 81 percent of the cases INS had taken no "deportation action" by the close of the study period).

[211] *See supra* Table V following note 187.

Since Congress's adoption of employer sanctions, all of this has changed, although it is still too early for reliable statistics. The "walk-in" rate is up considerably in the district offices, and evidence suggests that, unlike in earlier years, many people now choose to file affirmatively for asylum in order to receive work authorization.[214] Once denied, they then have incentives to press INS to initiate deportation. In a striking role reversal, the immigration bar and refugee support groups have been urging INS to *hasten* arrangements for the issuance of orders to show cause in these circumstances, in order to assure an early forum for rearguing the asylum claim and, by no means incidentally, to renew work authorizations.[215] Past statistics thus furnish no reliable guide as to the magnitude of the delay problem under the present multilayered administrative system, given the new employer sanctions.

d. *Rights to Counsel*

One further element of possible delay lurks in the current system, owing to a major feature meant to enhance fairness to the applicant. Statute and regulation provide a right to counsel in the immigration court proceeding, although at no expense to the government. They also mandate the provision of a list of pro bono counsel available in the area.[216] When asylum claims rise numerically, the limited numbers of pro bono attorneys are easily swamped.[217] This situation places immigration authorities in a difficult position as they try to keep pace with rising intake—a perfectly legitimate and praiseworthy bureaucratic objective. Inevitably, they have incentives to press for waivers of counsel or else to deny repeated continuances requested because of free counsel's limited availability. Recent court decisions, however, are imposing increasingly demanding requirements to assure a knowing waiver of counsel rights. Concomitantly, courts are increasingly insistent that the immigration judges allow continuances until pro bono counsel becomes available.[218] Obviously, in times of major influx, or in areas where counsel is limited, this stance can cause backlogs to increase substantially.

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[212] The employer sanctions scheme, INA § 274A, 8 U.S.C. § 1324a (1988), was enacted as part of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359.

[213] *See generally* Martin, *The End of De Facto Asylum*, *supra* note 105, at 163-64 (1987-88).

[214] *See* B. Frelick, The Back of the Hand: Bias and Restrictionism Towards Central American Asylum Seekers in North America 17 (U.S. Comm. for Refugees 1988).

[215] *See* Memorandum from Ignatius Bau and Robert Rubin (July 13, 1987), *reprinted in* 64 INTERPRETER RELEASES app. II at 882, 886 (1987); *see also INS Advises on Work Authorizations for Denied Asylum Applicants*, 65 INTERPRETER RELEASES 718 (1988). Similar incentives may someday operate at the judicial review stage, at least as long as the work authorization regulation remains unchanged, but that appears a more remote prospect, given the reluctance of most experienced asylum attorneys to take a weak case to court. *See supra* text following note 206.

Court reversals for failure to honor these (qualified) counsel rights are particularly demoralizing to the system, for such reversals inevitably come months or years after the initial proceedings and all later phases of administrative consideration, at a time when the deportation or exclusion order is administratively final. Moreover, such reversals plainly require complete rehearing in the immigration court, possibly followed again by administrative and judicial review.[219] If the system is to be prepared reliably for speedy determinations despite a fluctuating caseload, the problem of counsel must be solved, either by wider provision of government-paid counsel[220] or by assuring fairness to the applicant even in the absence of counsel.

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[216] *See* INA §§ 242(b), 292, 8 U.S.C. §§ 1252(b), 1362 (1988); 8 C.F.R. pts. 292, 292a (1989).

[217] For an example of these complications, see Maldonado-Perez v. INS, 865 F.2d 328, 329-32 (D.C. Cir. 1989).

[218] *See, e.g.*, Baires v. INS, 856 F.2d 89, 92-93 (9th Cir. 1988); Castro O'Ryan v. INS, 847 F.2d 1307, 1312-13 (9th Cir. 1988); Haitian Refugee Center v. Smith, 676 F.2d 1023, 1031 (5th Cir. 1982). Some cases are more tolerant of the agencies' efforts to process cases in this manner. *See, e.g.*, Committee of Central American Refugees v. INS, 682 F. Supp. 1055, 1065 (N.D. Cal. 1988); Vides-Vides v. INS, 783 F.2d 1463, 1470 (9th Cir. 1986).

[219] Class actions challenging broad features of asylum processing can likewise lead to this result. *See supra* note 3.

[220] At least one commentator regards the Equal Access to Justice Act (EAJA) as a possible solution to these problems. *See* Note, *Applying the Equal Access to Justice Act to Asylum Hearings*, 97 YALE L.J. 1459 (1988). But EAJA is at best a half-measure that affords only marginal relief, because attorneys and agencies cannot know up front whether or not they will actually be compensated from the public treasury. It may be years before the fee question is settled. At best EAJA may attract a few more

The reforms proposed below center on a nonadversarial model that could provide a full and fair opportunity to present an asylum claim, even if the individual is unrepresented. Although efforts would be made to accommodate counsel's schedule, the proposed system is designed to proceed with fairness on a fairly prompt timetable, even if the applicant expresses a desire for pro bono counsel but insufficient numbers of counsel are available to meet the demand. It must be acknowledged that such a proposal will be highly controversial. Due process, at least when the stakes are high, is often closely associated with adversarial trial-type proceedings, which usually require professional counsel.

If the nonadversarial model is not accepted as the way of providing fairness to unrepresented asylum applicants, some carefully crafted alternative is imperative. It is essential to maintain the system's capacity for expeditious processing, without the risk that a court will send the case back to square one months or years later. The best alternative is probably for Congress to amend the statutes to eliminate the ban on government-paid counsel—not for all immigration matters but only for nonfrivolous asylum cases.

Because of unpredictably fluctuating caseloads, it would probably be best, if such a course is chosen, to follow a public defender model, assigning the representation responsibility to a permanent staff of government-paid attorneys.[221] Such a staff would provide other advantages as well, because of the expertise they could develop concerning country conditions over the course of litigating numerous cases. Naturally, applicants could still retain private counsel or engage unaffiliated pro bono attorneys when available, but the pace of proceedings would no longer be so dependent on private charity.[222] Obviously, the cost of such a system would be substantial, and

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attorneys into initially pro bono representation, and groups currently providing assistance may be able to expand their staffs using EAJA awards from past cases. But unless the expansion far exceeds expectation, pro bono attorneys are still unlikely to be able to keep pace with new arrivals in times of large influx. Either delays will continue or many applicants will remain without representation—again risking judicial remand many months hence.

[221] Arrangements could be made for adequate insulation of these officers to assure an independent litigation posture, or perhaps the function could be performed under contract with a nongovernmental organization that would agree to maintain an adequate legal staff at the necessary locations, paid from government grants. Britain has arrangements of roughly this sort with the United Kingdom Immigrants Advisory Service (UKIAS), although not all of UKIAS's representatives are lawyers. *See generally* EUROPEAN CONSULTATION ON REFUGEES AND EXILES, ASYLUM IN EUROPE: A HANDBOOK FOR AGENCIES ASSISTING REFUGEES 371 (3d ed. 1983).

[222] As an added benefit, NGOs might then find it easier to target their own

the visibility of an appropriation for such purposes, at a time of extreme budgetary stringency, makes this course politically unlikely. But the current statutes (allowing counsel only "at no expense to the government") provide only illusory cost savings. Although no money goes directly to the applicant's counsel, the government incurs substantial expenses, primarily from detention prolonged by the period necessary to wait for the pro bono counsel to become available. Other indirect costs are harder to quantify but probably more substantial—for example, the burdens on local services caused by massive influxes of asylum seekers.[223] A speedy system is imperative if such burdens and costs are to be reduced.

2. Accuracy

a. *Diffusion of Responsibility*

The current system fails to focus responsibility for this difficult and challenging decisionmaking on one set of officials. It thus enhances the risk of improper denials of asylum, even if all officials act in good faith. Over the years, INS spokespersons have sometimes responded to complaints about asylum denials by pointing out that all cases are checked with the State Department, which has expertise concerning these matters, and that INS almost always follows the Department's lead.[224] At the same time, however, State Department officials have often felt that it was INS or the immigration judges who really performed the important part of asylum decisionmaking. Department officials, after all, see only the printed page. Much of the adjudication must turn on credibility judgments—clearly a task principally for Department of Justice adjudicators, who see the applicants in person and can test the stories through direct questioning.[225] The system thus courts the risk that a negative State Department opinion will induce some relaxation in Justice Department care in examining individual cases. Yet that

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scarce resources on cases they regard as most deserving, or as critical for establishing an important factual or legal precedent.

[223] *See* Appendix (for rough cost estimates).

[224] *See generally* ASYLUM ADJUDICATIONS, *supra* note 142, at iii, 61-64. Similarly, a 1983 study of asylum processing in New York noted "a certain discomfort with asylum cases" among immigration judges that led to heavy reliance on State Department views and a some disavowal of responsibility. *See* P. Fagen, *supra* note 141, at 16.

[225] *See* ASYLUM ADJUDICATIONS, *supra* note 142, at 60. I also encountered this attitude with some frequency during my own service in BHRHA (known simply as HA in State Department lingo) from 1978 to 1980.

opinion may have been issued in recognition that a cold record is not fully revealing, and in anticipation that the alien will have another chance to bolster her case before an adjudicator she will see in person.

It is not an easy thing to send a person back to a land where she claims she faces persecution. Unsurprisingly, officials may therefore seek at times to minimize their own role in such results. But arrangements that unintentionally help to meet that psychological need may entail systemic costs. A system that provides undue comfort in going along with negative results may fail to create adequate incentives for the care needed to spot the truly meritorious case.[226]

The reduced role for the State Department under the new sticker system should ameliorate this problem. A more complete focusing of the decision on a single set of adjudicators would provide even greater assurance. It would also give applicants the opportunity to make their cases in person to the official who will be responsible for all phases of the decision.

b. *Political Bias*

For decades the asylum adjudication system has been attacked for the bias of its results.[227] No completely reliable scientific test of these claims is possible, and a GAO study chartered to discover whether asylum applications were given neutral consideration could only conclude that the matter was "uncertain."[228] Nevertheless, even a quick glance at the statistics in Table II raises serious questions about the high grant rates for applicants from communist countries (particularly Poland, where political activity became much freer after the lifting of martial law in 1984), and the strikingly low rates for El Salvador and Guatemala. Moreover, testimony about bias comes in highly persuasive form from published accounts by INS insiders as well as from INS's critics.[229]

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[226] *See* Anker & Posner, *supra* note 31, at 76; Aleinikoff, *supra* note 89, at 193-94.

[227] *See, e.g.*, G. LOESCHER & J. SCANLAN, *supra* note 2, at 170-219; N. L. ZUCKER & N. F. ZUCKER, *supra* note 61, at 142-76; Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 260-62 (1984); Kurzban, *A Critical Analysis of Refugee Law*, 36 U. MIAMI L. REV. 865, 876-78 (1982); Note, *Political Bias in United States Refugee Policy Since the Refugee Act of 1980*, 1 GEO. IMMIGR. L.J. 495 (1986) [hereinafter *Political Bias*]; Note, *Behind the Paper Curtain: Asylum Policy versus Asylum Practice*, 7 N.Y.U. REV. L. & SOC. CHANGE 107, 107-09, 124-26 (1978).

[228] *See* GENERAL ACCOUNTING OFFICE, *supra* note 150.

[229] *See* ASYLUM ADJUDICATIONS, *supra* note 142, at 59 n.*; Meissner, *supra* note 2, at 57, 63 (describing the pressures that skewed decisionmaking, with special attention to Poland and El Salvador; the author was Acting Commissioner of Immigration from

Much of the outsiders' criticism blames bias on the role of the State Department (recently modified) in providing advisory letters on every case considered in the district offices and immigration courts.[230] Clearly that practice provides an opportunity for diplomatic considerations to intrude on what the statute ordains should be neutral, case-by-case decisionmaking.[231] For this reason, it would be far better to remove the Department from any substantial role in the decisionmaking system.[232] No matter how conscientious the State Department may be in performing this function, the aura of distortion is bound to linger. Moreover, the Department itself would benefit from such separation. When the home-country government is angered by an asylum grant, its ire can be more easily deflected by our diplomats if the Department can credibly state that it had no role in the decision.[233]

1981-83 and Executive Associate Commissioner from 1983-86). In unguarded moments, some Reagan Administration spokespersons also revealed that they regarded asylum adjudications as inherently political. For example, in arguing (unsuccessfully) for extradition reform legislation that would have transferred from the courts to the State Department the authority to decide whether a particular offense was "political" and hence non-extraditable, the Deputy Legal Adviser stated: "[A] decision on the 'political offense' exception is (as the name suggests) *inescapably political* in nature, and inextricably intertwined with the conduct of foreign relations. It is an issue best left to the Executive branch to decide—*much as the decision to offer political asylum is an executive decision.*" *Extradition Reform Act of 1981: Hearings on H.R. 5227 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 32 (1982) (prepared statement of Daniel W. McGovern) (emphasis added).

[230] *See, e.g.*, Posner, *Comments and Recommendations on Proposed Reforms to United States Immigration Policy*, 36 U. MIAMI L. REV. 883, 887 (1982) ("[O]ne of the most troubling problems with the current immigration system is the State Department's involvement in the decisionmaking process."); *Political Bias*, *supra* note 227, at 537 ("The chief problem concerning residual political bias in asylum adjudications is the critical role that the State Department plays in assessing asylum claims.").

[231] *See, e.g.*, Zamora v. INS, 534 F.2d 1055, 1062 (2d Cir. 1976) (noting "some likelihood of the Department's tempering the wind in comments concerning the internal affairs of a foreign nation"); Kasravi v. INS, 400 F.2d 675, 677 n.1 (9th Cir. 1968) ("A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations . . . ."); Aleinikoff, *supra* note 89, at 194, 234-35.

[232] For an argument that the State should retain its role, see Burke, *supra* note 163, at 325.

[233] Some system should still be worked out for regularly notifying the State Department of cases received, to help prepare it for cases that will spark political controversy with the home government, to assure identification of any asylum seekers who may prove to be defectors with sensitive information, and perhaps to allow for the Department or the intelligence agencies to introduce confidential information bearing on the claim, pursuant to procedures permitting use of such information in limited circumstances. *See, e.g.*, 8 C.F.R. § 208.10(c), (d) (1989) (setting forth procedures for disclosure of non-record evidence). Each eventuality is rare in asylum cases.

Removing the State Department from asylum processing has been advocated for years. But many critics fail to think through carefully the continuing risks of political bias even then, unless other important changes are made as well. The "coast of Bohemia" problem would still be present.[234] Indeed, it would probably be aggravated. As Lippmann observed in her classic study, those who know less about the realities of an issue or a far-away land are more likely to rely on the "pictures in their heads" to cope with a challenging and complex mass of data.[235] Without State Department advice, nonexpert adjudicators will be confronted with just such a dilemma.

A 1986 episode, widely reported in the newspapers, reflects the impact of such stereotyped thinking. The district director in Miami decided in April of that year to end all returns of aliens to Nicaragua from her district, because of concern that they might be persecuted by the Sandinista government. She was quoted as saying: "I would personally—not just as a Government official, but personally—have trouble sending people from a Communist country back to that country."[236] Although this position was at odds with State Department information (as reflected in the annual country reports and in the fact that numerous advisory letters for Nicaraguans were still negative), and contravened Congress's explicit decision in 1980 to adopt a neutral standard to replace former provisions that expressly favored refugees from Communist countries, the Justice Department apparently made no effort to discipline the district director or otherwise bring her actions back into line.[237]

The phenomenon is not confined to the district offices. Some immigration judges also volunteered to me during office interviews that they considered a certain country (usually a Communist country) too dangerous for return, although none offered very complete or convincing reasons for this judgment. Certainly they did not claim that it was based on State or Justice Department policy or on country guidelines or across-the-board authoritative findings. It was simply based on their views about current world conditions. In the context of the conversations, I would not regard these comments as deliberate bias; they were meant as sincere efforts to implement the statute's commands in light of that person's understanding of home-country conditions. But especially when matched up with competing stereotypes that may lead to great skepticism of claims from Central Americans other than Nicaraguans, the potential for inaccurate results and for unfairness is manifest.[238]

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[234] Even today, the State Department's advice is not always followed. Some impressionistic evidence, however, suggests that the failure to follow the advice has its own bias that compounds the favoritism for those who flee Communist countries. *See* T. Aleinikoff & D. Martin, *supra* note 3, at 705.

[235] W. Lippmann, *supra* note 81, at 30-49.

[236] Pear, *Key Federal Aide Refuses to Deport any Nicaraguans*, N.Y. Times, Apr. 17, 1986, at A1, col. 1.

[237] *See id.*; Dreifus, *supra* note 72, at 35. It appears likely that this action, along with other Department leniency toward Nicaraguans over the last two years, became well-known back in Nicaragua and played a role in eventually encouraging large numbers of people there to think about migration to the United States. The fruits of that encouragement were felt in the Harlingen district, at a rate of several thousand marginal applications for asylum each month during the winter of 1988-89.

Most immigration judges, it should be stressed, strive conscientiously to apply the legal standards fairly based on the records before them. But the potential for improvement remains. Some better way should be found to correct as much as possible for the unintended bias that derives from the adjudicators' inevitable creation of internal maps, particularly if the State Department is to be removed from routine involvement. Systematic effort should be undertaken to replace stereotypes with detailed and accurate information, helpfully digested. The "coast of Bohemia" problem can never be eliminated, but it can be minimized.

c. *Inadequate Use of Existing Expertise*

The immigration judges' role is firmly anchored in the adversarial model; by and large, they are expected to remain as passive arbiters ruling on records developed by the parties.[239] Initiative by the judges to learn more about country conditions is not officially encouraged. EOIR Chairman Milhollan has specifically rejected an AILA suggestion that judges should receive more training on country conditions, and reaffirmed the traditional adversarial model.[240]

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[238] *See* P. Fagen, *supra* note 141, at 21 (finding that presumptions based on national origins distorted asylum adjudications).

[239] In this respect, of course, EOIR is simply trying conscientiously to move away from a problematic past, when immigration procedures were harshly criticized for their inquisitorial character and for the mixture of enforcement and adjudicative roles for the special inquiry officers. *See* T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 87-91. This effort is praiseworthy in most immigration-law settings, but certain elements fit uneasily in the asylum proceeding. Most troublesome is the assumption that the judge is a kind of blank slate at the beginning of each new case. *See generally* S. LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 2-3 (1988) (identifying a "neutral and passive decision-maker" as a key element of the adversarial model). This specialized kind of adjudication, unlike most other matters within the immigration courts' jurisdiction, cannot be performed well unless the adjudicator brings to the case cumulative expertise concerning country conditions. *See* E. RATUSHNY, *supra* note 64, at 15-18, 51.

[240] New immigration judges, however, are given specific training on asylum

She stressed "that it was the attorney's responsibility to offer whatever evidence she or she deems appropriate to meet the alien's burden of proof in asylum cases."[241]

Officially, therefore, immigration judges and the Board of Immigration Appeals must decide asylum cases based only on the record created in the specific case.[242] In reality, particularly when numerous cases are received from the country involved, the judges and the Board cannot help but remember, and, to some extent, use information learned in other cases. In fact, some immigration judges have become quite knowledgeable about conditions in those countries, especially in Central America, whose nationals account for a high percentage of asylum claims. Indeed, this is a praiseworthy practice that probably helps improve the quality of decisionmaking, even though it violates the formal requisites of the adversarial model.

One immigration judge I interviewed had in her office an impressive array of books, including biographies and recent nonfiction bestsellers, that reflected some of the political developments in foreign countries whose nationals were sometimes encountered in the courtroom. She said she tries to do a fair amount of such reading, in order to have a better "feel" for the cases that come before him. I worried a bit about the evenhandedness of the readings; most dealt with the victims of Marxist regimes, and the judge's readings seemed to have led to a special reluctance to return anyone to such countries. Nevertheless, this extracurricular reading program is admirable—far preferable to the attitude encountered in some decisionmakers who rested content with whatever information the parties happened to add to the record. But such helpful approaches should not be left to the initiative and energy of individual adjudicators. We should instead devise a system that provides more systematically and honestly for such learning, and also gives assurance that adjudicators develop as balanced a picture as possible from their readings.

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matters as part of their standard two-week training course, including presiding over a simulated deportation case wherein asylum is the chief issue. But this training can only be scheduled when there are enough new judges (about eight) to justify the session. Therefore some judges may hear numerous cases before attending the sessions. In addition, annual conferences of the judges usually offer some program on asylum, at times including presentations by refugee advocacy groups and human rights organizations.

[241] *Report of Meeting Between American Immigration Lawyers Association and Executive Office for Immigration Review Department of Justice*, 65 INTERPRETER RELEASES app. III at 743, 749 (1988) (reporting on AILA-EOIR meeting).

[242] *See In re* M—, 7 I. & N. Dec. 222, 225-26 (1956).

3. Consistency and Quality Control

An important component of fairness is consistency of outcomes among decisionmakers.[243] If judged only by asylum decisions in the immigration courts, the consistency goal would appear to be well-served, primarily through the mechanism of BIA review. Even now when the Board ordinarily sits in two panels, it remains a sufficiently small and cohesive body that it can reasonably assure similar outcomes for similarly situated aliens. Moreover, because both INS and the applicant can appeal to the BIA, the Board is in a position to police against both false positives and false negatives.[244]

A substantial body of asylum claims, consisting of the applications that are granted in the district office, however, escapes this checking process. These applications amounted to 39.1 percent of cases decided there in FY 1988, and 27.8 percent as a cumulative percentage for cases decided over the past five years.[245] Of course, anyone unfairly *denied* asylum in the district office may renew the application in immigration court, where consistent results are more likely. The problem thus is one of inconsistent positives—a less disturbing result, perhaps, than inaccurate negatives resulting in return to the home country of a truly deserving asylum-seeker. One might possibly argue that false positives are not a genuine problem, that they reflect merely the system's commitment toward giving asylum seekers the benefit of the doubt.

Such a view should be resisted. False positives, in the long run, also harm the system, in two ways. First, the general patterns in asylum cases are communicated back to the home country.[246] An excessive pattern of false positives can thus help stimulate a larger flow of marginal asylum applicants. Such a communication process appears to have played a role in the surge of Nicaraguan applications in Texas in the winter of 1988-89.[247] Second, when the false positives are systematically biased in favor of certain groups, as appears to be the case at present, they undermine public confidence in the system and perhaps increase the chances that courts will be tempted to overturn accurate denials of other nationalities in an attempt to restore some rough parity. False positives, when systematically favoring certain groups, also violate the underlying premises of the system. Those premises require neutral adjudication, committed to providing asylum to those, and only those, sufficiently at risk of persecution in the home country.[248]

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[243] In a well-functioning system, consistency should also go far toward serving the goal of accuracy. The claim here is more modest, because of doubts about the validity of some of the BIA's doctrines, making it too hard for some nationalities to win asylum and too easy for others. *See,* e.g., *In re* Fuentes, Interim Dec. No. 3065, slip op (BIA Apr. 18, 1988); *In re* Maldonado-Cruz, Interim Dec. No. 3041, slip op. (BIA Jan. 21, 1988), *rev'd,* 883 F.2d 788 (9th Cir. 1989). Nevertheless, even within such a framework, the value of fairness would be served by assuring that Nicaraguans in Miami receive the same consideration as Nicaraguans in Nebraska, and that Salvadorans in Texas are treated no more harshly than Salvadorans in California.

[244] This BIA capacity, however, is unfortunately undercut to a certain extent by APRU's role. Although APRU is scrupulously careful not to intervene in the quasi-judicial proceedings before the immigration judges and the Board, it does occasionally reopen discussion with INS on the merits of a case *after* a deportation order is administratively final. To the extent that this leads to a later grant despite the EOIR denial, it undermines some of the consistency the BIA attempts to obtain.

[245] *See supra* Table II following note 150.

[246] *See supra* note 118 (discussing sociological studies of the role of social networks in stimulating or facilitating migration).

The 1980 regulations were crafted with some attention to the problem of false positives. Some advocates had urged that the regulations allow prompt grants of asylum by district directors in meritorious cases, without referral to the Department of State. The Justice Department decided against this approach, in part to assure greater consistency by checking overhasty grants by examiners.[249] But this limited check never worked with great efficiency, because State had no way to follow up on cases in which asylum was granted by the examiner in spite of a negative advisory letter. In any event, this consistency check has virtually evaporated now, when the majority of referred cases come back with a sticker that simply indicates that State has nothing to add.

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[247] *See* Frelick, *INS Seeks Tougher Approach on Asylum, Work Authorization, But Faces Legal Challenge,* Refugee Reports, Jan. 27, 1989, at 1, 2 (reporting that Associate Attorney General seeks to rescind earlier Meese policy that was quite generous to Nicaraguans, viewing it as "a contributing factor to the current situation" in South Texas).

[248] *See generally* Kurzban, *supra* note 201, at 115. This careful insistence on neutrality and consistency in ruling on asylum applications under INA §§ 208 and 243(h) would not preclude the granting of temporary residence rights to specific groups chosen by the political branches, based on a combination of political and humanitarian factors, through EVD or special legislation, for example. But decisions of that sort, to shelter a wider category of needy individuals, should be clearly seen as such—political decisions rather than quasi-entitlements. Such clarity both avoids distortion of asylum adjudication and focuses appropriate responsibility for such safe-haven decisions in the political branches.

[249] This theme was voiced frequently in internal government meetings in which the author, then a State Department official, participated in 1980. *See generally* Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims,* 59 Cornell L. Rev. 772 (1974) (describing elaborate quality control systems, based on sampling and follow-up, used by some social-welfare adjudication systems).

Finally, it could be that the Asylum Policy and Review Unit was meant to bring greater consistency to this body of decisions. APRU's method of operation and limited staffing, however, force APRU to place its greatest emphasis on cases in which asylum was denied in the district offices rather than when it was granted. In doing so, APRU unnecessarily duplicates the roles played by other units involved in the process. Indeed, the Asylum Policy and Review Unit is hard to justify under any vision of sound asylum adjudication process. It adds a layer of procedure, and it seems likely only to confuse the guidance that INS examiners attempt to follow in adjudicating cases, heightening the risks of inconsistency. After all, those examiners already are mandated to consider the views of the State Department, and they are bound to follow the legal doctrine developed by the BIA.

Why was APRU created? If inadequacies in State Department information led to this step, obviously it would be more effective to address the specific deficiencies at State—or else to replace that Department with another method of providing up-to-date information. If, instead, direct review through the normal channels (involving the immigration judges and the BIA) was failing to assure proper outcomes, it would have been far better to address those deficiencies directly, rather than by throwing another agency at the problem.

IV. Proposed Reforms

A. *Specialized Adjudicators*

Any cure, short- or long-term, for the ills afflicting our present asylum adjudication system should build upon one central change. The United States should create a corps of specialized, well-trained professional adjudicators[250] to preside at the asylum adjudication proceedings and to make the initial determinations in a single, unified procedure, replacing the two wasteful rounds of wholly separate, de novo consideration now available. The adjudicators should have no other function in the immigration system, nor should they rotate to this post from other en forcement responsibilities. This change would greatly improve the system's accuracy, fairness, and speed, whatever other reforms might ultimately be adopted. The change would better equip us to welcome refugees promptly, as our tradition demands, as well as to deport unqualified applicants expeditiously. Nearly all other Western countries have built their systems around such specialists. It is high time that the United States joined their ranks.

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[250] Similar suggestions have been made for many years. *See, e.g.*, Anker & Posner, *supra* note 31, at 74 ("To insure that applicants receive the sympathetic assistance necessary to a fair resolution of their claims, asylum cases should be separated out from routine immigration cases and handled by specially trained officials."); Select Commission, *supra* note 69, at 173-74. For a sensitive discussion of the rules and advantages of specialized adjudication systems, see S. Legomsky, Specialized Justice (forthcoming Oxford University Press 1990).

To attract high-quality professionals, the new office should set the grade and salary of the adjudicator's position at a level equivalent to that enjoyed by immigration judges.[251] Asylum adjudicators make decisions every bit as complicated and challenging—and as important to the government and the litigants—as other cases that fall within present EOIR caseload. This means that costs for the new system, at least for the first several years, will run considerably above the recent experience under the current system, particularly because several dozen adjudicators will be needed.[252]

We must develop the capacity, however, to accept short-term expenditures in order to avoid larger long-term societal costs, costs that are unavoidable as long as we remain vulnerable to influxes of marginal asylum applicants. The new system, if effectively implemented, should finally straighten the many kinks that now prevent or greatly delay actual deportation of unsuccessful applicants. Once it becomes widely known that the system has that capacity, future influxes should decline significantly (barring major outbreaks of persecution in this hemisphere). Such results are, doubtless, years away. Expending enough now to do the job right, however, is an indispensable investment.

Canada's recent experience reveals the need to consider the long-range effects of the expenses. In January 1989, Canada implemented a promising new system, built around a corps of independent, professional, full-time adjudicators supported by its own documentation center.[253] At that time, the system was confronted with a backlog of 85,000 cases and an intake level that had run to 45,000 in 1988. To deal with this task, by the summer 1989, the new Immigration and Refugee Board had hired not only the sixty-five permanent full-time members authorized by statute for its refugee division, but also an additional eighty or more members with two- or three-year terms. It also planned to add another fifty or more over the next year to help eliminate the backlog. All such officials were hired at a high rank, with a salary in the range of $50,000 to $60,000. Canada expected to spend over $70 million in 1989 on asylum adjudications.[254] This outlay is considerable. The proposal offered here differs from the Canadian model in several important particulars, partly in order to develop a less costly system. Significant expense, however, cannot be avoided.

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[251] Early internal papers that ultimately led to the August 1987 proposed rules discussed an option of making the new adjudicators "attorney examiners" with the higher rank that classification carries. Unfortunately, INS chose the cheaper option, making the asylum adjudicator's position a journeyman-examiner position, at the GS 11 or 12 grade.

[252] *See* Appendix (for the cost estimates).

[253] *See* sources cited *supra* note 112.

The most important qualifications to be sought in recruiting and selecting asylum adjudicators are interest in international affairs and demonstrated awareness of and sensitivity to life in other cultures.[255] Although current adjudicators could, of course, apply for such positions, an effort should be made to assure a wide diversity of backgrounds among those hired, both to provide the necessary cross-cultural sensitivity and to signal that the new system marks a clean break from a problematic past.[256]

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[254] Interview with Jerry Robbins, Director General, Operational Policy and Planning, Immigration and Refugee Board, in Ottawa, Canada (Dec. 19, 1988). The figures are translated into US dollars.

[255] Several persons interviewed for the study (most of whom were from countries other than the United States) stated that characteristics other than legal training may be most important in identifying good asylum adjudicators. They urged that serious thought be given to hiring nonattorneys. Canada has taken this approach for the majority of the adjudicators (Immigration and Refugee Board members) recruited for its new system, even though the position carries a salary that would be sufficient to attract attorneys. *See supra* note 254 and accompanying text. In an early draft of this study, I thus suggested recruitment among nonattorneys with the requisite international experience and sensitivity, without, of course, precluding lawyers. This suggestion, however, drew a strongly negative reaction, from government officials and refugee advocates alike. Not only will the adjudicators have to follow fairly complicated developments in the burgeoning American case law on asylum, but also, and perhaps more importantly, they will very often be dealing with lawyers for the applicants, in the course of conducting the proceedings and constructing the factual record. That record, in turn, is meant to be the basis for both the initial decision and further review, which will be entirely under the stewardship of lawyers. I have therefore withdrawn the suggestion. At least for the American administrative context, dominated as it is by lawyers and infused with the American cultural preference for an adversarial form of justice, asylum adjudicators should be trained attorneys.

[256] A provision in an early Simpson-Mazzoli immigration reform bill would have created a separate unit of immigration judges to decide asylum cases after special training, but, in an extraordinary measure apparently meant to demonstrate a complete break with the past, it provided that no one who had served as an immigration judge before the date of enactment could hear asylum cases. *See* S. 2222, 97th Cong., 2d Sess. § 124(a)(2), 128 CONG. REC. 21,671, 21,675 (1982) (proposing new Immigration and Nationality Act § 208(a)(2)). The 1983 version of the bill

A demonstrable change from the past, fortified by a visible commitment of added resources to assure professionalism, would also serve other useful functions. First, such a change would maximize the chances of gaining the support, or at least the acquiescence, of refugee advocacy groups. (Indeed, a major effort should be undertaken to encourage NGO participation in shaping the final details of any such plan.) The August 1987 proposed regulations foundered, in part, because they did not sufficiently indicate a genuine departure, nor did they reflect any real commitment of new resources.

Second, a major shift to an impressively professional group of adjudicators might also send an important message to the courts. The shift would show that the new system was not cobbled together solely as a hasty reaction to the recent rise in the numbers of asylum seekers, but that the reform attended to the needs of asylum seekers truly in danger of persecution at home. The history of dealings between agencies and courts in the asylum field suggests that a fresh start is well-advised.[257] The object of these reforms is not to launch a system that will work only after years of paralysis resulting from test cases. The object is to create a system that can work fairly and efficiently after only a brief start-up period, and that can actually lead to swift grants and denials—the latter leading to prompt deportation. This objective cannot be achieved unless the courts are prepared to defer to the agency in the vast majority of cases.[258]

Many Western countries have developed adjudication staffs whose members specialize by region or even by country of origin. Such specialization would be ideal, for it would improve still further the development of expert and detailed knowledge to be brought to

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eased this restriction, however, simply preventing such service until the judges received special training in international relations and international law. *See* S. 529, 98th Cong., 1st Sess. § 124 (a)(1), 129 CONG. REC. S6970, S6975 (daily ed. May 18, 1983).

[257] *See* cases cited *supra* note 3 (describing the years of litigation which resulted when Haitian asylum seekers initiated the first major challenge to the government's procedures for asylum adjudication). In the *Haitian Refugee Center* litigation, the element most damaging to the government's case may have been the revealing fact that INS tally sheets for reports on the "Haitian program" contained room only for the number of denials; it had no line for reporting on grants of asylum. *See* Haitian Refugee Center v. Smith, 676 F.2d 1023, 1031-32 (5th Cir. Unit B 1982). Not surprisingly, the courts concluded that the effort was meant to clear dockets without attention to the merits of individual cases. *See id.* at 1040.

[258] *See, e.g.*, Mashaw, *supra* note 249, at 806-07 (suggesting that an important factor determining whether a reviewing court will take an interventionist or a deferential stance is the court's "confidence or lack of confidence in the integrity of the underlying administrative process").

bear in the cases.[259] Nevertheless, such a system is probably not fully attainable in this country, owing primarily to geography. In Switzerland, for example, the full federal government adjudication staff can remain in Berne. Applicants simply come to the capital via an inexpensive train ride for their interviews with the appropriate country specialist. The United States is too vast for such a system. Nevertheless, there may be some chance for a limited specialization in various locations where particular nationalities have congregated (such as Poles in Chicago or Nicaraguans in Miami). In any event, most current asylum seekers come from Central America and the Caribbean. Recruitment efforts should therefore focus on persons already familiar with the cultures of that region, and all adjudicators should receive training and ongoing information on country conditions there.

The new system should be expressly based on an understanding that these adjudicators will develop expertise about country conditions over time and may apply their cumulative learning to each case they encounter. As developed above, such expertise will help serve several important objectives. It will facilitate adequate questioning at the hearing to cover all necessary details, help in assessing credibility, and undergird the ultimate evaluation of the risk the applicant would face if returned. Training must emphasize that the adjudicator's mission is as much to help substantiate meritorious claims as it is to issue prompt denials when the claimant is unqualified.

Other elements, some detailed in succeeding sections, would also serve to develop and preserve the needed expertise. Perhaps most important would be a well-staffed documentation center, independent of the State Department. The task of this documentation center would be to amass unclassified information on country conditions from a wide range of sources, including both the State Department and private human rights organizations, in order to make this information available in as accessible a form as possible. Many other nations have devoted resources to official documentation centers of this type. Canada, in particular, has pioneered several innovative and useful techniques, including frequently updated country profiles and background information on all significant source countries.[260] In addition to assuring that they remain current on developments in source countries, adjudicators should be able to use the center, with the help of its staff, to search for information about particular legislative facts. For example, if the claimant asserts that she was involved in a major demonstration in November 1983, in the capital city and that the demonstration was violently suppressed by the police, an adjudicator could seek confirmation of such an event from the center. Or, if the claimant asserts that government soldiers forcibly impress young men into the armed forces, the adjudicator could ask the documentation center staff to provide whatever information is available from its database on such matters. (Fairness constraints on the use of such information are discussed below.) The center's resources should also be open, of course, for use by asylum seekers and their counsel.[261]

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[259] *See, e.g.,* Aleinikoff, *supra* note 89, at 234 (advocating a system where decisionmakers can improve their ability to judge the credibility of an application by becoming "thoroughly familiar with conditions, events, political parties, and social groups" in particular countries); Kälin, *supra* note 107, at 239 (recommending that officials be knowledgeable of the particular cultural background of the asylum-seekers whose cases they decide, in order to prevent cross-cultural miscommunication and impaired decisionmaking).

Because this new system would develop its own capacity for obtaining and evaluating a wide range of country condition information, routine referral of cases to the State Department should be eliminated.[262] Individual adjudicators might still refer a particular matter when it appears likely that State Department information, not otherwise available through the documentation center, would be particularly helpful. But solicitation of State Department views should be the exception, not the rule.

There remains the "coast of Bohemia" problem. Indeed, when I described early versions of this proposal to some private attorneys, they expressed deep concern that expert adjudicators of the sort proposed here might become overly dogmatic in their own distinctive views of conditions in the home country. And with the removal of any second-round de novo consideration before the immigration judges, advocates would lose at least one important opportunity to correct for such bias.

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[260] *See* Rusu, *supra* note 112. *See generally* Rudge & Kjaerum, *The Information Aspects of Refugee Work—Time for a Full-Scale Information Strategy*, REFUGEE ABSTRACTS, Dec. 1988, at 1; Thoolen, *Refugees and Information Technology*, REFUGEES, Oct. 1988, at 34, 36 (advocating an international refugee documentation network).

[261] Ideally, the new system would follow a practice carefully adhered to in Switzerland. The Swiss system specifically provides that 10 percent of each officer's work week be set aside for keeping current on the latest information received in the center regarding countries for which she has responsibility.

[262] Arrangements should still be made for referral of "urgent action cases," such as those involving defectors and diplomats, to the State Department so that it may handle the immediate diplomatic consequences. Or perhaps only basic biographic data on each applicant could be provided to the State Department, solely for the purpose of screening by the national security agencies, rather than generating a letter containing State Department views on each application.

No system can be designed that escapes this problem altogether. But it hardly seems prudent to retain multiple layers of de novo consideration on the chance that the pictures inside the head of the second adjudicator will cancel out those inside the head of the first. Such a system is a recipe for stalemate or confusion, even though fewer deportations may actually result while litigation drags on. A better approach, though hardly foolproof, is to craft a system candidly aware of the risk of such distortions and dedicated to avoiding them.

The best cure for dogmatic stereotyping is steady provision of reliable information—constantly forcing the participants to redraw the pictures inside their heads to conform more completely to the new, more detailed, and more accurate information.[263] This kind of corrective is far more likely to be successful under the proposed system than under the present system, if only because the adjudicators will be confronting such information full time, rather than considering asylum cases as a fraction of their workload. Other strategies, such as weekly regional updates prepared by the documentation center staff, ongoing training procedures, and well-targeted monitoring, can offer further assurances, if pursued with sufficient determination by the agency.

B. *Organizational Location*

Who exactly would perform such monitoring and arrange for ongoing training? That is, where would this new office be located, and what would be its lines of accountability? Earlier studies have sometimes argued for a fully independent asylum adjudication office, headed, for example, by a multi-member board appointed by the President and removable only for cause.[264] Independence would indeed carry perceptible advantages. Principally, it would ensure reasonably neutral decision making, insulated from foreign policy influences and sheltered from dominance by an enforcement perspective.

But full independence of this sort might not provide adequate assurance to those who worry primarily about asylum as a loophole.

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[263] *See* W. Lippmann, *supra* note 81, at 402-405.

[264] *See* Aleinikoff, *supra* note 89, at 234-35 & n.170; *see also* N.L. Zucker & N.F. Zucker, *supra* note 61, at 276-77 (citing numerous studies advocating a refugee authority independent of political considerations).

And, in any event, full independence is not likely to be politically acceptable. Traditionally, Congress has insisted upon keeping a wide range of functions and authorities in the immigration field, whether they relate to enforcement or adjudication, under the control of the Attorney General.

It remains possible, however, to achieve most of the objectives of independence while retaining general responsibility in the Attorney General. The obvious location for a new unit of this sort would be within the Executive Office of Immigration Review. Created in 1983, that Office has evolved over the last several years into a major subunit of the Justice Department concerned exclusively with adjudication and review, and freed of entanglement with enforcement functions. Although EOIR reports to the Attorney General, it is sufficiently removed from foreign policy and enforcement responsibilities to afford reasonable assurance of neutrality and independence in asylum adjudications.[265] The August 1987 proposed regulations might have been more acceptable if they had placed their new corps of asylum adjudicators within EOIR, rather than keeping the unit in INS.

The proposal, therefore, could be framed in this way. Statute or regulation should create within EOIR a new Asylum Board, headed by a chairperson responsible directly to the Attorney General. The chair would supervise a staff of asylum adjudicators, hired as described above, who would probably be located in several offices distributed around the country as caseloads require. The chair would also be a member of any administrative appellate unit dealing with asylum (to be discussed below).

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[265] As a practical matter, the Attorney General exercises his authority over EOIR decisions only through use of her "referral" power under 8 C.F.R. § 3.1(h) (1989)—for example, because it would set a wide-ranging precedent. Referrals are rare, and in any event they are publicly known and visible, thus minimizing the risk of improper invasion of adjudicative neutrality. *See also* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954) (limiting other opportunities for control by the Attorney General of Board of Immigration Appeals decisions). Similar procedures should likewise shield the determinations of the asylum unit.

Some commentators appear to assume that any adjudications still under the responsibility of the Attorney General will be inevitably tainted with an enforcement outlook. *See, e.g., Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1363-66 (1983) (asserting that the "implicit threat of abolition" of the Board of Immigration Appeals by the Attorney General "undermines the independence of the Board's judgment"). *See generally* U.S. COMM'N ON CIVIL RIGHTS, THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 40-43 (1980) (citing several explanations for the emphasis on enforcement activities by the Immigration and Naturalization Service). This approach is too mechanical. Functional independence and neutrality grow from and are nourished by a far wider range of ties and reinforcements; judgments about independence based solely on inspection of an organization chart or tenure protection provisions are likely to be misleading. *See* J. MASHAW, BUREAUCRATIC JUSTICE—MANAGING SOCIAL SECURITY DISABILITY CLAIMS 41-44 (1983); T. ALEINIKOFF & D. MARTIN, *supra* note 3, at 91, 451-53.

C. *Nature of the Proceedings*

Because the asylum adjudicators would lack jurisdiction over other immigration law issues, under this proposal, asylum determinations will obviously be separate from deportation or exclusion proceedings. Those who walk in to a district office to apply affirmatively for asylum should receive the necessary form and be given enough time to complete it and gather any desired supporting information. Once the form is returned, the case can be referred to an adjudicator. Denial by the adjudicator would foreclose future consideration of the issue in deportation proceedings. If the asylum issue is raised only after the alien is already in proceedings, the immigration judge should adjourn the hearing, pending a decision on the asylum claim by the specialized adjudicator.[266] Alternatively, special arrangements could be made, particularly when the party concedes deportability and suggests no other relief from deportation, for speedy entry of a conditional deportation order—conditional on the outcome of the asylum adjudication. Careful thought should be given to streamlining these procedures so that, if the asylum claim is not accepted, a fully effective deportation order can take effect as soon as possible.

Other questions about the nature of the proceedings are more basic, for they go to the fundamentals of how evidence will be presented and tested, both in the interest of the applicant and in the interest of the government. Recommended here is a nonadversarial model that assigns to the adjudicator the major responsibility for developing the record, including the marshaling of both positive and negative information, and adds certain measures to assure fairness for the applicant and a complete opportunity to present her best case.

The choice of a nonadversarial model may seem surprising in light of constitutional due process considerations.[267] Under a *Mathews v. Eldridge*[268] analysis, it is customary to consider that asylum seekers have a most vital private interest at stake. And, although the government's interests may also be weighty, particularly in light of the pressures created when asylum applications are numerous, it remains customary to think of adversarial trial-type proceedings as the best guarantees—perhaps indispensable guarantees—when individual stakes are high.[269]

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[266] The August 1987 proposed regulations spelled out detailed arrangements for such a procedure. They also provided possible procedural models for consideration of asylum claims that arise only after deportation proceedings have ended, and for limited opportunities for reopening denied claims based on changed circumstances. *See* 52 Fed. Reg. 32,552, 32,554, 32,558-59 (to be codified at 8 C.F.R. pts. 208.3, 208.18) (proposed Aug. 28, 1987).

But a closer look at the Supreme Court's procedural due process jurisprudence reveals that the Court does not prescribe adversarial procedures as a requirement in all settings where important interests are at stake.[270] Fundamentally, due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner."[271] What is meaningful should be decided, not in the abstract, but only after careful attention to the specific adjudicative task at hand.[272] *Eldridge* is not to the contrary. In fact, the *Eldridge* analysis—and particularly its middle factor—asks us to move away from rigid reliance on the classical trial-type hearing model and to inquire instead into what makes the most sense for assuring fairness in the precise adjudication at issue. That middle factor invites us to undertake a careful comparative inquiry, weighing the relative merits of the adversarial and nonadversarial models *in the asylum context.* Viewed in this light, an adversarial asylum hearing, presided over by a passive judge who officially knows nothing about the relevant issues except what appears in the record, should be seen as a poor servant of either fairness or accuracy.

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[267] *See generally* Scanlan, *Asylum Adjudication: Some Due Process Implications of Proposed Immigration Legislation*, 44 U. PITT. L. REV. 261 (1983) (analyzing a number of constitutional difficulties with the changes proposed by the Senate version of the Simpson-Mazzoli "Immigration Reform and Control Act of 1981").

[268] 424 U.S. 319 (1976). *Eldridge* established the Supreme Court's framework for resolving procedural due process issues. This framework requires courts to consider three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. This analysis has often been criticized as inadequate, primarily for focusing too much on accuracy and too little on the "dignitary" interests of the individuals involved. *See, e.g.*, Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976) (asserting that "the failing of *Eldridge* is its focus on questions of technique rather than on questions of value"). Those critiques may have less weight in the immigration setting, but, in any event, *Eldridge* remains the governing standard.

[269] *See* Mashaw, *supra* note 249, at 772, 775 (describing and criticizing this view). *See generally* Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983) (arguing for greater acceptance of nonadversarial procedures).

[270] *See, e.g.*, Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 320-334 (1985) (finding that a veteran's difficulty in procuring legal representation for Veteran's Administration benefit claim procedures caused by a $10 attorney's fee limitation does not violate due process requirements); Parham v. J.R., 442 U.S. 584, 606-09 (1979) (holding that an adversary proceeding to determine the appropriateness of decisions to commit children to state mental hospitals is not required where an inquiry has been made by a staff physician); Goss v. Lopez, 419 U.S. 565, 583 (1975) (stopping short "of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions [from public school] must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call her own witnesses to verify her version of the incident"); Richardson v. Perales, 402 U.S. 389, 410 (1971)

First, several of the basic assumptions that underlie our usual preference for trial-type procedure do not apply here. That preference derives from the view that rebuttal evidence, cross-examination, and confrontation provide "the best way to resolve controversies

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(approving significant role for presiding administrative law judge in questioning applicant for social security disability benefits, as against claim that this practice unconstitutionally mixed the role of prosecutor and judge and upholding use as evidence of written physicians' reports supporting nondisability, notwithstanding the reports' hearsay character, the absence of cross-examination, and the directly opposing testimony by claimant and her medical witness).

[271] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[272] *See, e.g.*, Califano v. Yamasaki, 442 U.S. 682, 696 (1979) (noting that the due process clause is not necessarily violated when "some leeway for practical administration" of a statute is allowed). Many other writers, including two eminent federal judges, have urged that American due process inquiry expand its horizons and acknowledge that fairness can often be well served by procedures other than trial-type hearings. *See, e.g.*, Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1052-55 (1975) (challenging the strictly adversarial nature of the U.S. legal system and suggesting more investigation into alternative systems of justice); Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267, 1287-91 (1975) (advocating an investigatory model for administrative hearings under which an independent decision maker would have the responsibility for developing all the pertinent facts); Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 314-16 (1978) (explaining that much of U.S. criminal trial procedure, most notably the active roles of prosecution and defense counsel, is of only recent historical origin and peculiar to the American legal system); *see also* Parham v. J.R., 442 U.S. 584, 606-09 & n.16 (1979) (approving nonadversarial procedures in the context of parental commitment of children to state mental institutions because "[t]he judicial model for factfinding for all constitutionally protected interests, regardless of their nature, can turn rational decisionmaking into an unmanageable enterprise"); O'Barr & Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC'Y REV. 661, 666-67 (1985) (criticizing the restraints placed on witnesses in formal adjudication).

involving disputes over adjudicative facts."[273] But cross-examination and confrontation are rarely among the tools used by an asylum seeker in an asylum proceeding, for a fundamental reason: The government offers its own witnesses only on rare occasions. In the overwhelming majority of asylum cases, the only witness actually testifying (as opposed to communicating in some fashion through documents) is the applicant himself, perhaps joined by family members. Therefore, the only cross-examination that takes place, most of the time, is that of the trial attorney who endeavors to expose inconsistencies or weaknesses in the applicant's own account. It could hardly be thought unfair to the applicant to replace such interrogation (designedly adverse) with questioning done instead by an examiner who has been instructed that her role is to develop a full record and not to strive zealously for a negative outcome.

The other information in the record is usually documentary, such as newspaper accounts or human rights reports. Very little of it relates specifically to the individual; virtually all of it has to do with legislative facts.[274] Reports concerning legislative facts may, of course, be rebutted, and occasionally it will be in the applicant's interest to attempt to do so—for example, to challenge something asserted in the State Department's human rights country report. But again, the usual adversarial tools are not necessarily of great assistance here. Rebuttal customarily takes the form of supplying competing documentary evidence that tends to controvert the asserted fact. The nonadversarial model proposed here makes full allowance for such submissions, along with argument based thereon. Moreover, unlike the present system that makes regular provision only for State Department input, the model here places responsibility on the adjudicator to consider not only State Department information, but also human rights reports from other reasonably available sources.

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[273] 3 K. Davis, *supra* note 93, § 15.3, at 144. Professor Davis amplifies those reasons as follows:

> The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes over adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention.

Id.

[274] The only likely exception may be an account of earlier statements the individual applicant gave to immigration officials, usually at the time of apprehension. For example, the account may say that the applicant told the officers she came to find a job. If the applicant disputes the accuracy of that account, it may be necessary to call the recording official to the hearing. But most often, the applicant does not challenge the fact of the earlier statements; she challenges their significance or seeks to explain them because of her reluctance to touch on risky subjects in the presence of uniformed officers. Here, too, the applicant's own testimony will be the relevant tool, not confrontation or cross-examination. For discussion of "legislative facts" see *supra* notes 93, 99-105 and accompanying text.

Second, an adversarial model functions well only when each of the three key roles (the judge plus the parties' representatives) is played by a professional who is well-equipped to deal with the subject matter and the techniques at hand. In asylum adjudication, satisfying this prerequisite is not simply a matter of assuring the presence of lawyers, for the ordinary generalist lawyer's tools often are insufficient to carry out an adequate inquiry, even into the immediate adjudicative facts. Substantial country expertise, supplemented by sensitivity to cross-cultural difficulties, is necessary even to perform an effective direct examination of one's own client. One manual for volunteer attorneys in asylum cases illustrates the need for such qualities: It recounts the story of "one lawyer who, upon hearing that her client had been chased by armed men in civilian clothing in El Salvador asked, 'Well, why didn't you go to the police?' "[275]

In short, the relevant expertise, detailed knowledge about conditions in source countries, is simply too scarce. One cannot expect three participants in the adversarial proceedings (two lawyers and one judge) to have this expertise except in rather unusual circumstances. Adopting a nonadversarial model would allow us to target resources on making sure that the one key participant, the adjudicator, is well equipped—equipped not only to make the final judgment, but also to frame questions throughout the hearing that will promote accurate understanding of the adjudicative facts at issue.

The nonadversarial procedures in asylum cases should thus proceed roughly as follows. The applicant would have the opportunity, as at present, to provide whatever information she wished when filing the Form I-589 (or preferably, a better designed application form). She might choose to supply lengthy answers to the form's questions, submit supplementary affidavits or accounts, or file general human rights information on country conditions. If the adjudicator is not already familiar with conditions in the source country, she will be responsible for establishing such acquaintance, with the aid of the documentation center, in advance of the proceedings. Such preparation would, of course, include review of all material supplied with the application.

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[275] COMM. FOR HEALTH RIGHTS IN CENT. AM. AND THE FATHER MORIARTY CENT. AM. REFUGEE PROGRAM, POLITICAL ASYLUM: A HANDBOOK FOR LEGAL AND MENTAL HEALTH VOLUNTEERS 44 (n.d.).

At the actual hearing, the applicant should first be invited to recount the important elements of her case and to add anything she wishes. The adjudicator would then pose questions meant to flesh out the account as necessary, to test its consistency, and to home in on the issues that appear, under the facts of the particular case, to be crucial to the ultimate judgment about risks faced in the home country. No government counsel would appear. If it developed that further information had to be gathered to enable effective examination, the adjudicator could adjourn the proceeding. But such postponements should be rare. The proceedings should be recorded verbatim, as occurs now in immigration court.[276]

If the asylum seeker has a lawyer (for example, through the efforts of an NGO), counsel could of course be present to advise and reassure the applicant throughout the proceeding. Beyond this, counsel's role should supplement that of the adjudicator, by posing further questions to expand or clarify and to put on other evidence, in those cases where such evidence is available. Most of the time the case would focus only on the factual inquiry, but, in those cases where substantial legal issues arise, counsel could, of course, offer argument on points of law.

The proposal is designed for reasonably full and certainly fair development of the affirmative case, even for inarticulate asylum seekers who appear without counsel, or with counsel insufficiently familiar with asylum cases or home country conditions.[277] The proposal is therefore meant to enable speedy but fair decisions in a heavily burdened system, without being entirely dependent upon the availability of pro bono efforts from the private bar.[278] If reasonably available, however, counsel's role should be welcomed, primarily for the way in which prehearing consultation can serve to sharpen the issues and especially to encourage reticent applicants to tell the whole story. The less the case has been developed beforehand by counsel, the more time the adjudicator will probably have to devote in order to identify the crucial factual elements on which the affirmative case rests. But clearly no adjudicator will be able to spend the thirty hours or more that private attorneys report spending, on occasion, to develop the full trust necessary to coax out the whole story. This deficiency must be acknowledged. But the system simply cannot be expected to go that far, on governmental resources, to help bring forth facts that are that elusive. Claimants bear the burden of coming forth with the evidence. The system cannot be designed for the chance (although it is admittedly real) that in a small percentage of the cases such delay and coaxing will unearth a meritorious case.

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[276] Eventually, however, it may be possible to find more expeditious ways to preserve the record for appeal. *See supra* note 174 (discussing use of videotapes).

[277] The setting would thus bear many similarities to social security disability proceedings, where the presiding administrative law judge is under an affirmative duty to develop both sides of the case. *See* Mashaw, *supra* note 249, at 779-83. Courts have found ways to police this requirement, particularly in instances where the applicant appears pro se. *See, e.g.*, Bluvband v. Heckler, 730 F.2d 886, 892, 895 (2d Cir. 1984) (finding that the administrative law judge presiding over the disability hearing failed to help the claimant ferret out all the relevant facts and adequately develop the record). Some 70 percent of the disability claimants are unrepresented. *See* 3 K. DAVIS, *supra* note 93, § 14:17, at 86; *see also* Mashaw, *supra* note 249, at 781-82. Nevertheless, the Supreme Court has specifically upheld this structure against

D. *Fairness and the Treatment of Legislative Facts*

The expert knowledge developed by the adjudicators would be used primarily to ask detailed and focused questions, to help evaluate the answers received, and to make the required predictive judgment about future risks the applicant would face in the home country. Using expertise in this manner should not present significant fairness difficulties; specialized adjudication is customarily assigned to administrative bodies specifically to take advantage of

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due process challenge. *See, e.g.*, Richardson v. Wright, 405 U.S. 208, 209 (1972); Richardson v. Perales, 402 U.S. 389, 410 (1971).

[278] As a further measure of reassurance to unrepresented applicants, especially those from backgrounds that might make official proceedings intimidating, it might be possible to emulate a feature of the Swiss system. The Swiss government pays a small stipend to volunteers, recruited by an umbrella refugee assistance organization, who have a right, by statute, to attend each asylum adjudication interview. *See* Loi sur l'asile du 5 octobre 1979 § 3, Recueil officiel des lois et ordonnances de la Confédération suisse [RO] 1980, at 1717, 1718, *amended* Modification du 16 decembre 1983, RO 1985, at 1, *further amended* Modification du 20 juin 1986, RO 1987, at 1674 (taking effect Jan. 1, 1988) (codified at Recueil systematique du droit federal [RS] 142.31). They are there primarily as observers, and they clearly do not see their role as lawyer-substitutes for the applicant; they do not meet with the applicants beforehand. But their presence can serve as an additional guarantee of fairness, and they also are generally permitted to pose questions at the end of the procedure to clear up any confusion or ambiguities.

such cumulative learning and specialization.[279] But if some facts developed by the expert adjudicators become central to particularized determinations crucial to the ultimate ruling, fairness may require additional steps before relying on this outside information. An example will help to clarify this point.

Suppose that the applicant claims she will be persecuted because she was a local organizer with the XYZ political party, a radical splinter group operative in a certain province of the home country. She offers evidence of a government crackdown on the organization, and indeed the country profile from the documentation center likewise reports the crackdown. But after examination, the adjudicator is prepared to rule as follows:

> I find the asylum seeker not to be credible in her claim of involvement with the XYZ party. I reached this conclusion primarily on the basis of certain questions I posed to her. I asked her who A was and I asked her who B was, and she did not know. A and B are key leaders of the XYZ party in that region (citing the sources of this information). Anyone even minimally active with XYZ would have known that. Therefore, her testimony regarding involvement with that group is not worthy of belief. Because her claim rested solely on that ground, her application for asylum will be denied.

In Professor Davis's conceptual scheme, this information about A and B is a legislative fact because it is not a fact concerning the immediate party. Hence, it need not necessarily be placed on record by means of live testimony subject to cross-examination; official notice is appropriate.[280] But because the information is being used here as the crucial basis for a credibility judgment, fairness may demand specific notification to the individual, with an opportunity to rebut. The Administrative Procedure Act makes provision for such situations in adjudications covered by its terms. It provides: "When an agency decision *rests on* official notice of a material fact not appearing in evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary."[281]

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[279] *See, e.g.*, E. Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 Duke L. J. 1, 43 ("In reaching a conclusion, the examiner or agency may rely on its special skills . . . just as a judge may freely use her legal skills in reading statutes and applying decided cases in the preparation of her opinion."); W. Gellhorn, *Official Notice in Administrative Adjudication*, 20 Tex. L. Rev. 131, 136 (1941) ("The conventional process of proof presupposes, in the main, that each case is a separate entity, which the trier of fact approaches with a more or less blank mind. The hypothetical foundation for that conventional process is absent when the trier of fact is an experienced governmental agency.").

Supreme Court precedents also support this notion. *See, e.g.*, FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 813-14 (1978) (holding that because the determinations were "primarily of a judgmental or predictive nature," the agency could apply its expert knowledge; "complete factual support in the record [for the agency's conclusions] is not possible or required"); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348-49 (1953) (a board may use its "cumulative experience," which "begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated").

[280] *See* 3 K. Davis, *supra* note 93, § 15.10, at 184. Some cases take a narrower

A variant of a procedure now used in district offices, when the examiner is prepared to deny an asylum claim based on information received from the State Department, might be employed here to afford the party an opportunity to rebut. Under the reformed system, the adjudicator could simply issue a "notice of intent to deny," giving the reasons as described above and citing the source for the information about A and B. The asylum seeker would then have a specified period of time (district offices now allow fifteen days) to rebut the information, either by showing that the source was mistaken and that A and B were not involved with the XYZ party, or by providing other reasons why the asylum seeker could not be expected to know them. This procedure should be sufficient to satisfy due process requirements.[282]

It should be emphasized, however, that in most asylum adjudica-

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view of official notice, apparently limiting it to the much smaller range of facts that may be judicially noticed—i.e., facts that are common knowledge or cannot reasonably be disputed. *See, e.g.*, Sosna v. Celebrezze, 234 F. Supp. 289, 290 (E.D. Pa. 1964) (holding that court's use of medical textbooks to bolster reports of examining physicians without notice to claimant was contrary to the Administrative Procedure Act); Glendening v. Ribicoff, 213 F. Supp. 301, 302 (W.D. Mo. 1962) (holding that the "consideration of . . . extra-record medical information was erroneous as a matter of law"). But the better authority is to the contrary, acknowledging that a wider scope for official notice is the concomitant of agency expertise. *See, e.g.*, McLeod v. INS, 802 F.2d 89, 92-93 (3d Cir. 1986) (approving use of official notice in asylum cases and emphasizing that it is a broader concept than judicial notice). Some cases taking a restrictive approach to official notice base their concern on the fact that such a practice may effectively shift the burden of proof from the agency to the individual. *See* Dayco Corp. v. FTC, 362 F.2d 180, 186 (6th Cir. 1966); *cf.* E. Gellhorn, *supra* note 279, at 45. But in asylum cases, the individual clearly bears the burden of proof in any event. *Cf.* Zamora v. United States, 534 F.2d 1055, 1062 (2d Cir. 1975) (Friendly, J. dictum) (approving use of State Department information in asylum cases, without making drafter of State letter available for cross-examination, so long as letter speaks only to legislative facts).

[281] 5 U.S.C. § 556(e) (1988) (emphasis added). *See generally* 3 K. Davis, *supra* note 93, § 15.10, at 184; E. Gellhorn, *supra* note 279, at 42-49.

[282] It might be possible to justify the issuance of the hypothetical ruling in the text even without advance notice of intent to deny, so long as an administrative appeal system is available on terms that would permit the alien to file rebuttal information in that forum. In the analogous situation under the APA, § 556(e) requires only that the opportunity to rebut be made available "on timely request."

tions this procedure will not be necessary. Most decisions will not "rest on" official notice of specific legislative facts of this character. Instead, the adjudicator will simply employ her general knowledge in making the ultimate predictive judgment about the risks the applicant would face on return.

E. *Administrative Review*

The objective of expeditious proceedings demands that the system achieve final deportation orders quickly, primarily to serve as a deterrent against others in the home country with marginal cases who may be thinking of coming to the United States to file for asylum. Obviously, any provision for administrative or judicial review will undercut that objective to some extent. Yet to leave the decision in the hands of one official, without even a cursory review on the administrative record compiled at the initial stage, would be intolerable when so much is potentially at stake for the individual. Some sort of review is indispensable.

1. Administrative Review or Not?

Because of the habeas corpus clause in the Constitution,[283] judicial review in some form appears inescapable. (Appropriately channeled judicial review is also highly desirable as an outside check on the administrative agency.) It is therefore tempting to consider eliminating administrative appellate review altogether, in the interest of speedy finality. After all, if judicial review must be available, then any administrative review simply adds a third layer of consideration.

Canada yielded to this temptation. The 1988 legislation establishing its new asylum adjudication system eliminates any centralized administrative review by a body equivalent to our BIA. If the United States should choose to follow that model (it is not the one favored here), it should at least take the other steps Canada pursued to minimize the risk of inconsistency and error despite the absence of administrative review. In Canada, proceedings on the merits of an asylum claim are invariably heard by a panel of two members of the Immigration and Refugee Board. The asylum seeker needs to persuade only one of them that the case is meritorious in order to achieve a favorable result.[284]

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[283] *See* U.S. Const. art. I, § 9, cl. 2.

[284] *See* [Canadian] Immigration Act §§ 46.02, 69.1(10), ch. 35, §§ 48.02, 71.1(10), 1988 Can. Stat. 903, 919, 938; *see also* sources cited *supra* note 112. A

Nevertheless, several people interviewed in Canada acknowledged that the new system remains vulnerable to the vice of inconsistency. For example, if it comes to the attention of the chairman of the Immigration and Refugee Board that a panel in Vancouver is granting asylum readily to members of a certain dissident group, but panels in Montreal are consistently denying asylum in such circumstances, the chairman has no direct measure available for achieving unified Board policy on the issue. Informal controls, primarily through the use of legal opinions or other advice from the Board general counsel's office, will probably ameliorate the inconsistency problem, but such measures are only advisory. Theoretically, consistency could be established in Canada through judicial review. But judicial review under these circumstances is heard in different courts at various levels and in various locations, rather than before a single tribunal. In this situation, consistency via the judicial route may take a long time to achieve.

In addition, centralized administrative review is desirable because of the difficult nature of the decisions that asylum adjudicators must make. This difficulty is best illustrated by use of a hypothetical. Assume that human rights reports reveal a gradually increasing pattern of government suppression of labor union activists in a Central American country. The first reports mention isolated arrests of certain leaders. Subsequent reports indicate that some of these detained leaders have been tortured. A few weeks later a wider circle of prominent union activists are arrested, although many still remain at large. At some point, the government's pattern of persecution crosses an important threshold, to the point where all union activists found in this country should be recognized as refugees based solely on their status as union activists. Determining when that line is crossed, however, is a difficult judgment call. In the midst of this evolving pattern, it would not be surprising for adjudicators initially to reach differing results. Consistency would be best served if a centralized forum exists for making a definitive and binding decision as to when the line is crossed—or at least for assuring that union activist asylum applicants in Miami are treated the same as their counterparts in California.

2. The Recommended Framework

A reformed U.S. asylum adjudication system therefore should

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helpful codified and annotated version of the Canadian Act is THE ANNOTATED IMMIGRATION ACT OF CANADA (F. Marocco & H. Goslett eds. 1989).

retain an administrative appellate body, both to make such difficult judgment calls and to monitor for consistent implementation of the standards throughout the country. Its basic role would be to consider appeals from denials by the initial adjudicators; consideration would be based on the administrative record and briefs filed by the asylum seeker as appellant. The appellant should be allowed a limited time, perhaps ten days, for the filing of an appeal. Likewise, the time allowed for briefing should be subject to fairly strict limitations. Even if the initial stage before the adjudicator is not adversarial, it may be worthwhile to treat appeals in a more adversarial manner, using INS appellate attorneys (as under the current system) to represent the government's interest when the matter reaches the administrative appellate body.

For reasons sketched earlier, it might also be advisable for the appellate authority to perform some monitoring role with respect to *grants* of asylum. Although inaccurate grants provoke less concern than erroneous denials, a broad pattern of undeserved grants serves to undercut the public's confidence in the system's fairness. To guard against this phenomenon, the staff of the appellate body might regularly receive and review decisions in all asylum cases, appealed or not, to watch for aberrant patterns. (The staff at this level, being centralized in one location, could probably specialize by region or country.) In limited circumstances, the appellate body could then use the device of certification[285] to bring an unappealed case, positive or negative, before it for further review. This sort of monitoring would provide a useful quality-control mechanism.

Thus, the appellate caseload would consist primarily of appeals initiated by denied claimants, supplemented by a handful of other cases brought before the body on its own initiative. Given adequate staffing, and assuming a solution to the transcript problem, this process of review—strictly on the record created below—should add only a few months to the overall delay, and then only in cases accepted for full appellate consideration.

There remains the question of the composition of the appellate body. Clearly the current Board of Immigration Appeals could perform this function; approximately half of the BIA's time is already devoted to asylum cases. Although the question is a close one, in the end, I recommend against assigning these functions to the BIA. Fairly or not, some NGOs identify the BIA as a significant source of the biased results that they believe the system has achieved over the past several years. Creation of a new Asylum Board would help signal the reality of a fresh start, making the more restrictive elements of the new scheme more acceptable. Moreover, asylum is likely to generate a substantial portion of contested cases under the immigration laws for the foreseeable future, thus justifying the creation of a new and permanent unit.

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[285] *See* 8 C.F.R. §§ 3.1(c), 3.7 (1989). A similar procedural mechanism provides for "referral" of cases to the Attorney General. *See id.* § 3.1(h).

An Asylum Board, as a separate administrative appellate body focusing solely on asylum cases, also will have a better opportunity to develop the necessary expertise in the function, including detailed acquaintance with home country conditions.[286] Members of the board should be attorneys, because difficult legal questions under the asylum provisions of the immigration laws will have to be settled in this forum.[287] The Asylum Board should be located organizationally within EOIR, and as indicated earlier, the chairperson of the Asylum Board should have general oversight and administrative responsibility over the corps of adjudicators.[288]

3. Country Guidelines

Some earlier reform proposals have suggested country guidelines or profiles as a device that would help streamline the process and simplify the adjudicative task.[289] For example, by 1981, it became clear that the regime in Iran had begun systematic persecution, often including summary execution, of adherents of the Baha'i faith. The State Department issued a policy statement announcing that Baha'is who escaped Iran should be considered refugees ipso facto.[290] A similar firm guideline might have been possible in 1978, declaring that anyone who escaped the indiscriminately murderous policies of Pol Pot's Cambodian government should be considered to have a well-founded fear of persecution on return. With such a guideline in place, the adjudicators would be freed of responsibility for the ultimate predictive judgment about whether the threat level crossed the threshold leading to recognition of refugee status. Instead, adjudicators would be able to focus on a narrower and more easily ascertainable issue: whether the individual claimant was truly an Iranian Baha'i or a Cambodian (and possibly whether she fell within one of the exclusion or cessation clauses of the refugee definition).

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[286] In the press release announcing the creation of APRU, the Justice Department emphasized that asylum decisions are "distinct from the normal operation and administration of the immigration laws." *Attorney General Announces New Asylum Policy Unit,* 64 INTERPRETER RELEASES 472-73 (1987). A new Asylum Board would thus allow appropriate specialization on the part of the BIA.

[287] Recent cases have presented the BIA, for example, with difficult legal questions concerning the appropriate standards for asylum claims by conscientious objectors, *see In re* A.G., Interim Dec. No. 3040, slip op. (BIA Dec. 28, 1987), or by participants in a coup plot. *See* Dwomoh v. Sava, 696 F. Supp. 970 (S.D.N.Y. 1988).

[288] The Asylum Board would also provide a logical centralized forum for receiving the views of the UNHCR (the Board being the rough equivalent of the State Department under the ad hoc arrangements worked out in the 1970s for UNCHR file review in Haitian cases, see *supra* note 191 and accompanying text). UNHCR officials stated to me that their preferred point of access is at the administrative appellate stage. Interview with Richard Stainsby, UNHCR Senior Legal Adviser, in Washington, D.C. (Oct. 1988). Several other countries have made arrangements for routine file review by UNHCR officials in this manner. Many NGOs place a high priority on a well-targeted UNCHR role, and its expertise could be of genuine assistance to the decisionmakers.

[289] *See, e.g.,* SELECT COMMISSION, *supra* note 69, at 169-171 (recommending that "group profiles should be developed and used by processing personnel and area experts to determine the legitimacy of individual claims" and expedite the process); Verkuil, *supra* note 203, at 1172 (suggesting that a list of countries with clear good or bad human rights records be prepared and updated); Scanlan, *supra* note 2, at 637-38

With the removal of the State Department from any major role in refugee matters, responsibility for discerning such patterns and issuing appropriate guidelines to asylum adjudicators—if guidelines are to be used at all—would appropriately devolve on the Asylum Board. The Board would remain primarily an adjudicative body, but the guidelines could be viewed as a natural outgrowth of the regular monitoring of country conditions that the Board should perform anyway in discharging its adjudicative responsibilities.

A large dose of realism, however, should curb extensive expectations about the likely utility of country guidelines. First, in view of the current caseload, which comes predominantly from Central America and the Carribean, appropriate occasions for their issuance are likely to be exceedingly rare. Clear patterns like those occurring in the Baha'i or Cambodia examples are unlikely to manifest themselves very often.[291] Guidelines are useful only when they can be

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(suggesting similar country profiles). The comparison is often made to overseas refugee programs, where country guidelines (more in the nature of group presumptions of refugee status) are sometimes employed. But such an approach is not workable in asylum. Rougher judgments on refugee status are tolerable in overseas processing because other screening tools provide an enforceable cap on the number who will actually be admitted to the country, however many are initially adjudged to meet the refugee definition. *See supra* note 38.

[290] *See State Dept. Reaffirms Policy on Asylum for Iranian Jews,* 62 Interpreter Releases 1000 (1985) (describing earlier policy announcements on Baha'is, as well as on Christians and Jews from Iran).

[291] Some European officials reported that clear patterns appear in a larger proportion of their caseload than occurs in the United States. They mentioned situations like that in Turkey, where opposition groups are highly organized and

based on particularized characteristics that sharply distinguish a certain group from the rest of the population. Most persecution in countries significantly represented in the current asylum caseload does not follow such crisp patterns. If guidelines can only say that "prominent" union activists or "visible" governmental opponents are likely to be persecuted, the subsequent adjudicative process will have to cover almost all the same ground it would cover in the absence of guidelines. The adjudicator would still have to pursue in detail the applicant's own personal history as a means of judging prominence or visibility based on her past activities and any threats made against her or her family or friends. Guidelines that must use such vague terms are probably worse than no guidelines at all, for they would impart an aura of misleading clarity, when the circumstances still require a highly individualized, contextual judgment.

Second, most guideline proposals envision the use of only affirmative guidelines—guidelines that lead to a grant of asylum if the individual matches the profile. Negative guidelines verge on denying individuals the right to demonstrate that their own personal threats are so great that they deserve recognition as 1951 Convention refugees regardless of the general state of human rights observance in the home country.[292] Although an approach relying only on affirmative guidelines is thus understandable, it obviously undercuts the utility of guidelines in streamlining adjudication. Moreover, the risk would persist that the absence of an affirmative guideline could be taken as an implicitly negative factor by an adjudicator.

There is a third limitation. Most proposals for the use of guidelines or profiles assume that they would be made public.[293] But in nearly every country visited, asylum officials expressed great skepticism about the idea of published guidelines. One Swiss official commented: "The next week half the applications would match the guidelines." Published country guidelines might wind up simplifying the ultimate predictive judgment about danger levels at the cost of encouraging more sophisticated fraud, thus complicating adjudication over whether the applicant truly belongs to a class favored by the guidelines. Other profiles used for a variety of law enforcement

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government response apparently correlates closely to the precise cell or splinter group to which the asylum seeker belongs.

[292] *See* N.L. Zucker & N.F. Zucker, *supra* note 61, at 272-73.

[293] *See* Verkuil, *supra* note 203, at 1172. Verkuil goes further and suggests that guidelines be adopted through a notice-and-comment rulemaking proceeding. Such a process, however, would appear to be too cumbersome to keep up with necessary changes as country conditions evolve.

and administrative purposes usually remain a closely guarded secret.[294] But if confidentiality is maintained (except to the extent that the underlying information is manifest in written decisions explaining individual grants and denials), the guidelines could be subject to the charge that they amount to a kind of secret and unaccountable decisionmaking.[295]

On balance, country guidelines probably would cause more problems than they would solve. They are by no means essential to a well-functioning system, and a reformed American structure probably should be designed without provision for them.

F. *Judicial Review*

Under current statutes, asylum determinations are fully reviewable in court, usually in connection with review of a deportation or exclusion order under INA § 106 (in the court of appeals for deportation, in the district court for exclusion). Courts apply either a "substantial evidence" or "abuse of discretion" test, depending on the precise issue.

Given overloaded court dockets, these avenues for review create significant potential for delay. If most denied applicants were to petition for judicial review after exhausting administrative remedies, delays would mushroom, negating any effective deterrent message that might derive from prompt returns. Although this appears an unlikely prospect at present, complete assurance against debilitating backlogs might someday require limitation or careful channeling of judicial review, which could be achieved only by statutory amendment.[296] But any trimming will be highly controversial, both

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[294] *See* J. MONAHAN & L. WALKER, SOCIAL SCIENCE AND LAW 207-27 (1985).

[295] This objection was voiced vigorously by the American Bar Association's Coordinating Committee on Immigration Law in its comments on a preliminary version of this study. Letter from Charles C. Foster to David A. Martin (Apr. 13, 1989).

[296] Some proposals have been offered that would eliminate judicial review of asylum decisions as part of a package of reforms grafting several additional safeguards onto the administrative process. *See, e.g.*, Scanlan, *Issue Summaries Submitted to the Select Commission on Immigration and Refugee Policies by the Center for Civil and Human Rights*, in SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, app. C to the Staff Report (Papers on Refugees) at 43, 67 (1981).

Short of emergency circumstances, attempts to eliminate judicial review are inadvisable for two reasons. First, carefully framed, such review plainly can serve a most useful checking function, assuring fulfillment of the protective purposes of our asylum laws. *See generally* Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205, 1209-11 (1989). Second, complete denial of review may not be because courts have performed a genuinely valuable service by correcting significant bureaucratic error or abuse in asylum processing, and because Americans generally hold the courts in high regard as guarantors of rights. Such changes therefore should be considered a last resort, to be employed only if the effectiveness of the administrative changes proposed above is badly undercut by the questionable use of judicial review for purposes of delay—abuse that is now rare. Thus, the discussion that follows should be taken only as a preliminary sketch of possible changes to judicial review—changes which, one hopes, will not be necessary.

Two primary aims, necessarily in tension, are generally accepted for judicial review in the asylum scheme. Judicial review should (1) play a limited but effective role in checking bureaucratic mistake or abuse, and (2) avoid imposing undue delay. With respect to the first goal, the court's checking function is necessarily limited; almost no one believes feasible a system in which the courts make de novo determinations of asylum. With respect to the second, obviously no one favors undue delay. Although views may differ on what delay is excessive, the discussion in earlier sections points out why expeditiousness is unusually important in the asylum setting. Delays tolerable in other administrative settings may become unacceptable here.

Should changes become necessary, close attention to these two aims suggests a reformed judicial review scheme that might maximize each. Deterrence of unworthy asylum seekers requires speed, but does not require the swift return of everybody who files an I-589. It requires swift return only of those whose cases are at best thin or marginal. In all likelihood, such cases constitute a substantial majority of the current caseload and of reasonably foreseeable caseloads in

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constitutional under article I, § 9 of the Constitution, which provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. *See generally Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1263-74 (1970). Aliens being removed from the country must necessarily be taken into custody, and it would not be difficult in many cases to allege colorable constitutional violations—the foundation for issuance of the Great Writ. In any event, absolute preclusion statutes tend to spring leaks. *See, e.g.*, Johnson v. Robison, 415 U.S. 361, 373 (1974) (holding that preclusion-of-review clause in veteran's benefits legislation does not bar judicial consideration of constitutional challenges to the legislation). A more productive course is to concentrate energies on channeling review into forms that will maximize effective judicial checks with minimum disruption. When substitute mechanisms are available for review in some form by Article III judges, restrictions on the availability of habeas corpus have been held valid. *See, e.g.*, Swain v. Pressley, 430 U.S. 372, 381 (1977) (the substitution of a new collateral remedy that is neither inadequate nor ineffective does not suspend the privilege of the writ of habeas corpus).

time of major influx.[297] Obviously, those with clearly meritorious claims must be permitted to stay. But presumably these are the cases the new corps of specialists will readily grant, thus obviating judicial review.

This leaves a third category: difficult cases on the boundary, understandably requiring more thorough deliberation, research, and possible reconsideration. Provided such cases continue to constitute a fairly small percentage of the caseload, this category of cases could remain pending in the overall administrative-judicial system longer without much damage to the deterrent message.[298] If this guess about proportions is roughly correct, the system could grant some form of access to Article III courts to all asylum seekers, provided that the mechanisms permit speedy termination of review unless a truly substantial question is raised.[299]

Canada's new system provides a potentially useful procedural model. Its legislation disallows judicial review of denied refugee claims unless the applicant first obtains "leave to appeal" from a specified court.[300] This device is not familiar to U.S. lawyers. Our system ordinarily allows review liberally without prior screening, although meritless appeals may be disposed of summarily. Our nearest analogue may be the certiorari process in the Supreme Court, which is plainly a screening mechanism that we reserve for the highest levels of appellate consideration.[301] Applying such a device at the very threshold of judicial review is unlikely to win easy acceptance. Proponents would carry a heavy burden of persuading the relevant audiences (including the Congress) that a unique device of this type is needed because of the special requirements of an asylum system being challenged by steeply rising numbers of applicants.

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[297] This guess would be changed if a Central American Hitler or a Caribbean Pol Pot came to power. But we would be in a much stronger position to rally political support for massive acceptance of refugees in such desperate circumstances if the system has won earlier public backing through clear demonstration of the capacity to refuse asylum when people do not qualify.

[298] This threefold division of cases (unqualified, difficult borderline, meritorious) is in principle a clear one. In practice, of course, actual location of the boundaries will be much tougher. If administrators differ greatly from the courts on where those boundaries lie, the latter are bound to intervene more, creating delays in more cases and undermining the hoped-for humane and targeted deterrent.

[299] For other proposals to curtail judicial review while maintaining needed safeguards, see Aleinikoff, *supra* note 89, at 236-38.

[300] [Canadian] Immigration Act §§ 82.1-84.1, ch. 35, §§ 83.1-85.1, 1988 Can. Stat. 903, 946-49.

[301] Certificates of probable cause, needed under 28 U.S.C. § 2253 (1988) and FED. R. APP. P. 22(b) to appeal a district court's denial of habeas corpus to a state prisoner, bear some similarities to this scheme, but there are important differences. First, the threshold for issuance is lower than what is suggested here. *See* Barefoot v. Estelle, 463 U.S. 880, 885 (1983). Second, denial of the certificate is itself open for reconsideration by a judge of the appellate court, whereas Canada has precluded further review of denial of leave to appeal.

Under the 1988 revisions to Canadian law, asylum applicants seeking court review on the merits (including review of assertions that natural justice has been violated—the equivalent of our constitutional due process claims) must file for leave within fifteen days of the administrative decision. The court will ordinarily make a determination on the application without a personal appearance. If leave is granted, the matter is scheduled for full hearing in the ordinary course. But if the judge is not persuaded that the case is worth considering, the matter goes no further; there is no appellate review of denial of leave. What makes a case worth hearing? Unfortunately, the Canadian legislation does not specify clearly, leaving it to the courts to develop precise standards.[302] Because the new Canadian scheme is still relatively new, it remains unclear just what operational tests will come to govern.

If this "leave to appeal" approach were to be adopted in the United States, the statute should clearly state the governing standard. The exact formulation requires further attention. But the basic idea, if both of the above stated goals are to be served simultaneously, would be to preclude full-fledged court review—with complete briefing and argument—unless there is a substantial likelihood of reversal of the administrative action.[303] This is essential. For such a change to effect the desired results, Congress would have to signal clearly that it expects substantial deference on the part of the courts to administrative decisions, and hence expects leave to be granted only in a small fraction of overall cases. (Moreover, court denials of leave to appeal should not themselves be appealable.) If the proportions do not work out as sketched above, however, and if most cases wind up being heard on the merits in the courts, then the "leave to appeal" arrangements, ironically, would actually serve to compound delays, by adding an additional round of paperwork. Full success depends on both an attitude of restraint by the courts and a dedication to high-quality professional adjudication by the agency, to reinforce the idea that judicial deference is fully merited.

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[302] *See* [Canadian] Immigration Act § 84.2, ch. 35, § 85.2, 1988 Can. Stat. 903, 949.

[303] This standard comes close to the test applied when a single Justice of the Supreme Court considers an application for a stay pending the full Court's ruling on the petition for certiorari. *See, e.g.*, John Doe Agency v. John Doe Corp., 109 S.Ct. 852, 853-54 (Marshall, Circuit Justice, 1989) (granting stay, in part because there is a "fair prospect" that the full Court would find the decision below to be erroneous). Although this formulation makes general schematic sense, it has hardly been framed in language suitable for a statute. I am not quite sure what precise formulation should be used to get the job done. What is meant to be communicated is more a mood or a posture for the courts, rather than a precise schema. The standard should signal that most often the job of adjudication belongs to the agency; the courts should not intrude too deeply into precise development of substantive standards or their implementation in the particular case. Court review is to be used as an outside check, an occasional chastener and reminder that accountability also runs to persons outside the bureaucracy.

If the scheme works as envisioned, all denied claimants would have access to an Article III judge; no bureaucratic decision could block that access. This fact is vital, for it preserves many of the incentives for agency self-policing that exist in more thorough schemes of judicial review. The officials involved in adjudication would know that in some cases (exactly which ones cannot be known in advance) the independent judicial branch will be reviewing their work. But the initial access to the courts would be of a strictly limited character. Within perhaps forty-five days, judicial review in a large majority of cases would be at an end, and the underlying deportation or exclusion order would become fully enforceable.[304]

G. *Deportation*

When the asylum claim is finally denied, the underlying deportation or exclusion order must be promptly executed. Prompt execution assures the only effective form of deterrent that does not depend on indiscriminate harshness meted out to all asylum seekers whatever the strength of their claim.[305] Surprisingly few such deportations occur at present, however, unless the alien has remained in detention.[306] The reason is simple. Asylum seekers occupy a low priority for use of scarce investigation and enforcement resources in the district offices. Those resources are targeted instead on criminal aliens and others apparently involved in major abuse of the immigration system.

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[304] A possible complication might arise under the proposal offered here because deportability and asylum would be decided in different venues. The Justice Department should be able to overcome this complication, however. In arranging for unified judicial review, following deportation proceedings, of denials of legalization under INA §§ 210(e), 245A(f), 8 U.S.C. §§ 1160(e), 1255a(f) (1989), despite an initial splitting of adjudication forums between Legalization Offices and immigration judges, the Justice Department is gaining valuable experience in working out such technical details. *See* Martin, *Judicial Review of Legalization Denials*, 65 INTERPRETER RELEASES 757, 761 (1988).

[305] *See* Martin, *supra* note 1, at 12-13.

[306] *See supra* notes 188-190 and accompanying text.

If we were to look only at each individual category in isolation, this ranking of enforcement priorities makes sense. Criminal aliens do pose a greater threat to society than failed asylum applicants, who are largely harmless and law-abiding job-seekers. Nevertheless, enforcement priorities must be reoriented to consider more than just individual characteristics. They must also take full account of systemic impacts. The rest of this proposal painstakingly seeks every reasonable opportunity to streamline each stage of an inevitably complicated procedure. That effort is for naught—any achievements are rendered illusory—unless this last piece is resolutely inserted into the puzzle.

H. *Emergency Responses to Large-Scale Influxes*

This study was chartered at a time of relative stasis and calm within the asylum adjudication system. For years applications in the INS district offices had remained at an annual level of 20,000 to 30,000. Although these figures ran some ten times higher than annual statistics in the mid-1970s, the number appeared politically tolerable. There was no undue pressure for quick fixes or emergency solutions. It would have been an auspicious time to provide for a phase-in of the ambitious changes suggested here, allowing for careful restructuring of offices and processes, the recruitment and training of new officers, and the inevitable adjustments and modifications that will appear advisable as actual implementation reveals new problems and opportunities.

But now, toward the conclusion of the project, the political situation has altered considerably, and any changes will have to be implemented in much less favorable circumstances. Large influxes of Central Americans to Florida and Texas during the winter of 1988-89 strained arrangements even for basic provision of shelter and food. "False refugees" claimed the front pages again, and the potential for political backlash reappeared. Radical solutions have been tendered, sometimes reflecting little understanding of the international and domestic legal framework.[307] Unfortunately, crisis is often necessary to generate the political will to make changes rather than to limp along under the old system. But patience for long-term solutions of the kind sketched here is in shortest supply at such times. And even if the political leadership remains committed to long term reform, political pressures may demand of the executive branch a showing of visible, immediate, and effective action that will stem the flow and dispatch pending cases quickly.

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[307] For example, an internal draft of draconian legislation, entitled the "Asylum Anti-Abuse Act of 1989," has been circulated within INS. *See* 66 INTERPRETER RELEASES 478-79 (1989).

I will therefore offer a few suggestions, plus a few words of caution about some quick fixes that have been suggested. But above all, any crisis-driven requirement for prompt action must not divert attention from the need to start implementing the central reforms proposed here as soon as possible. Almost every conceivable (and certainly every reasonable) emergency response will be easier to implement, to sustain, and to render effective, if emergency measures are accompanied by the steady phase-in of a more reliable, high-quality, one-tier adjudication system staffed by a corps of true professionals, insulated from foreign policy concerns, sensitive to cross-cultural communication difficulties, and equipped to make effective use of the disparate array of information sources that must be employed.

1. Quick Denial of Manifestly Unfounded Applications

Several countries have made use of fast-track denials of "manifestly unfounded" asylum claims (what I will call here "MU procedures"), and in time of large-scale influx, such possibilities become attractive. A well-designed MU procedure could conceivably help amplify the qualified deterrent message that the United States now is trying to send to those in Central America who may be contemplating a trip northward.[308] But its contributions to this end would be modest, and its complications may outweigh its advantages, at least under current conditions.

The UNHCR Executive Committee (a body in which the United States is a key participant) adopted a formal Conclusion in 1983 on "the problem of manifestly unfounded or abusive applications" for asylum.[309] It gave cautious endorsement to the creation of an expe-

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[308] This proposal is necessarily founded on an assumption that a large majority of the recent Central American asylum seekers do not qualify for asylum under current legal standards. That assumption is debatable, on legal and factual grounds, but for reasons that cannot be elaborated here, I believe it to be defensible.

[309] Conclusion No. 30 (XXXIV), 38 U.N. GAOR Supp. (No. 12A) at 25-26, U.N. Doc. A/38/12/Add.1 (1983). Conclusion No. 30 states in relevant part that the UNHCR Executive Committee:

> (c) Noted that applications for refugee status by persons who clearly have no valid claim to be considered refugees under the relevant criteria

ditious procedure for dealing with such applications, but it warned against over-use of such measures, particularly in view of the "grave consequences" of an erroneous determination.[310] It therefore emphasized that any interview used in such procedures should be conducted by a "fully qualified official" and that the decision should be made by the "authority normally competent to determine refugee status."[311] The Executive Committee was primarily concerned that such responsibilities would devolve on border police,[312] who would be ill-equipped to carry out the role and might have incentives to use MU procedures to exclude asylum seekers without an adequate effort

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> constitute a serious problem in a number of States parties to the 1951 Convention and the 1967 Protocol. Such applications are burdensome to the affected countries and detrimental to the interests of those applicants who have good grounds for requesting recognition as refugees;
>
> (d) Considered that national procedures for the determination of refugee status may usefully include special provision for dealing in an expeditious manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure. Such applications have been termed either "clearly abusive" or "manifestly unfounded" and are to be defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum;
>
> (e) Recognized the substantive character of a decision that an application for refugee status is manifestly unfounded or abusive, the grave consequences of an erroneous determination for the applicant and the resulting need for such a decision to be accompanied by appropriate procedural guarantees and therefore recommended that:
>
> (i) As in the case of all requests for the determination of refugee status or the granting of asylum, the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status;
>
> (ii) The manifestly unfounded or abusive character of an application should be established by the authority normally competent to determine refugee status;
>
> (iii) An unsuccessful applicant should be enabled to have a negative decision reviewed before rejection at the frontier or forcible removal from the territory. Where arrangements for such a review do not exist, Governments should give favorable consideration to their establishment. This review possibility can be more simplified than that available in the case of rejected applications which are not considered manifestly unfounded or abusive.

Id.

[310] *See id.* paras. (d), (e), at 25.

[311] *Id.* paras. (e)(i), (e)(ii), at 25.

[312] *See id.* para. (e)(iii), at 25.

to find the facts. Thus, such decision authority should be given to the system's ordinary asylum adjudicators.

With these cautions in mind, MU procedures for the United States might be built on the following framework. Those persons apprehended by INS or "walking in" to INS offices who apply for asylum, or otherwise express fear of being returned to the home country, should be given the application form and told to complete and file it within a limited time period. Upon receipt of the form, an asylum adjudicator would go over the form and any other information in the alien's file to perform a preliminary screening. If the case clearly seems to have substance, it should simply be set for the regular interview or hearing procedure. If it looks as though the claim might be manifestly unfounded, it should be set for an early MU screening interview, which should be recorded verbatim.

If, during the MU screening interview, the applicant tenders a plausible basis for her asylum claim, the matter should be passed on to the next stage, the merits hearing, which would probably take place several weeks later. Access to the full merits hearing should be permitted even if the applicant's present account seems to contradict earlier statements given to the immigration officials. The individual may be pressed about seeming contradictions, but, unless the responses reveal clear and continuing fraud, the applicant should make it to the next stage in the process.[313] There are simply too many possible innocent explanations for inconsistent initial statements in these settings, owing to the manifest difficulties of cross-cultural communication and to the understandable reticence that truly persecuted people may feel upon their first encounter with uniformed American officials.

The MU procedure is not the forum for resolving such contradictions. To do so adequately would require expanding the procedure until it became virtually indistinguishable from the merits procedures.[314] This fact unavoidably limits the utility of MU procedures. If the individuals come from countries with known human rights problems (and this includes the Nicaraguans, Salvadorans, and Guatemalans who make up the bulk of the current influx), MU procedures will probably screen out only a handful of them. This handful would consist mainly of persons so poorly advised by friends or "travel agents"—or so honest—that they speak during the MU interview only about crop failures at home and job attractions here. But a more restrictive approach carries too high a risk of quick return of true refugees.

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[313] Apparently a high percentage of the current applicants say something about coming to the United States for a job during their first encounters with INS, and only later begin speaking of feared persecution. Because of cross-cultural differences, one cannot simply apply a presumption that the first statement is the more accurate or honest (even if such a presumption might make sense in dealing with American citizens in other contexts). It is entirely possible that the individual muttered a non-threatening response in the first encounter with uniformed officials only because her entire experience in her home country taught her to volunteer nothing to people in uniforms. The change of story, of course, should be explored fully in the merits hearing, but it cannot be treated as dispositive in the MU procedure.

[314] The Department of Justice actually drafted a kind of MU procedure, using

If the application is found to be manifestly unfounded, the consequence would be some truncation of normal procedures. Again, many variants are possible; the most effective would require statutory change. Possible limitation by regulation alone, however, might take the following shape: The MU determination should constitute a final negative ruling on the asylum and withholding claims, without the possibility of de novo consideration or further review in any administrative forum.[315]

If statutory changes are deemed advisable, the MU determination could also serve to limit judicial review, but with safeguards. Limited judicial review would be possible, through a summary procedure like that suggested above for deciding on "leave to appeal." There would be one difference. If the court found the MU determination unsupported, it would not schedule full-fledged court review. It would simply remand the case for a full merits hearing before the

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different terminology, in asylum regulations proposed in 1978. Those regulations allowed for "summary judgment" on a shortened timetable, in cases that appeared straightforward—i.e., that appeared to lack any genuine issues of material fact. *See* 43 Fed. Reg. 40,801 (1978). The 1978 proposal never made it into fully operative final regulations, however. The agency explained its abandonment of the idea as follows:

> Critics cite as hardships [rendering the summary judgment procedure unfair] the circumstances of many newly arrived applicants for asylum who face a language barrier and suffer from a lack of education and limited financial resources . . . .
>
> The objections to the summary judgment provisions have merit. Upon reconsideration, this type of motion appears to be rather sophisticated given the nature of the proceedings and situation of the individuals . . . . [Also, s]ince applications for asylum most frequently involve disputed facts a motion for summary judgment would rarely lie.

44 Fed. Reg. 21,254 (1979). These considerations have lost little force in intervening years and may still counsel against adopting such a procedure, under whatever name.

[315] An exception might be made for review solely on the initiative of the Chairperson of the Asylum Board, much as the Chief Administrative Hearing Officer may now arrange for review of certain administrative orders issued by Administrative Law Judges under 8 U.S.C. §§ 1324a, 1324b (1988) within thirty days of the order's issuance. *See* 28 C.F.R. § 68.52 (1988).

adjudicator. On the other hand, if the court approved the MU finding, the deportation order would become final and immediately enforceable, without the possibility for further judicial consideration.

Obviously the force given an MU determination cautions that MU procedures should not be used unless training and recruitment have proceeded to the stage that the Justice Department has substantial confidence in the officers doing the MU interviews. The ever-present temptation will be to overuse MU determinations. A report prepared by Professor A.M.J. Swart of the Netherlands for the Council of Europe found that exactly this sort of error was being committed. She reported that national authorities implementing MU procedures in several European countries

> are inclined to want to judge the merits of a request fully in order to see whether it is abusive or unfounded [rather than 'clearly' abusive or 'manifestly' unfounded]. This means that criteria which have been developed to do no more than make a first, rough selection possible, become so important that the selection itself becomes the crucial moment in asylum procedure for all asylum seekers.[316]

The lack of adequately trained and equipped personnel at present may pose a substantial obstacle to effective implementation of MU procedures as an immediate response to the current high application rate. Such a procedure would be far more reliable once a staff of independent and professional asylum adjudicators is in place—another reason to move quickly toward implementation of such a new administrative scheme. Still, MU procedures should not be expected to carry a heavy load. Even Germany, which has had several years to perfect its MU techniques, can dispose of only about twenty-five percent of its cases in this fashion, and Canada has eliminated only about ten percent this way under its new system.[317] A better solution, as the UNHCR's formal Conclusion on this issue ultimately suggests, may be instead to target resources towards assuring speedy completion of full merits hearings and all review stages.[318]

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[316] Swart, *The Problems Connected With the Admission of Asylum Seekers to the Territory of Member States*, in THE LAW OF ASYLUM AND REFUGEES: PRESENT TENDENCIES AND FUTURE PERSPECTIVES 65, 80 (Council of Europe 1987).

[317] *See* von Pollern, *Die Entwicklung der Asylbewerberzahlen im Jahre 1988*, 1989 ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK (ZAR) 23, 26 (from 1982, when MU procedures were introduced in Germany, through 1988, 25.32 % of cases were denied as "manifestly unfounded;" for 1988, the figure was 26.38 percent); Refugee Determination in Canada: First Quarter Review 10 (Apr. 25, 1989) (noting that 89% of 2,037 claims concluded at the initial stage were referred for a full merits determination). A UNHCR study estimated that manifestly unfounded or abusive claims constituted 10 to 15 % of "unscheduled arrivals" in industrialized countries in 1984. *See* Jaeger, *Irregular Movements: The Concept and Possible Solutions*, in THE NEW ASYLUM SEEKERS: REFUGESS LAW IN THE 1980s 23, 31 (D. Martin ed. 1988).

2. Disqualification for Transit Through Third Countries

Some interest has also been expressed in new rules that might disqualify applicants from asylum or withholding of deportation if they have passed through other countries where they could have applied for asylum before reaching the United States. Because virtually all asylum seekers from Central America travel through Mexico, some regard this as a nifty device to deal with most of the current caseload.

This proposal, however, poses such serious legal and practical problems that it should be abandoned.[319] Suppose a Salvadoran files for asylum and is told that her claim will not be heard on the merits because she should have applied in Mexico. What exactly will be done with her? Presumably she could be sent to Mexico, if Mexico would agree to receive her, but the odds that Mexico would accept such a person, much less tens of thousands of needy Salvadorans, are almost nonexistent.[320] The only country likely to accept her would be El Salvador, the country where she claims she would be persecuted. Her transit through Mexico to the United States by no means proves that she had no legitimate fears in El Salvador. Both Article 33 of the 1951 Refugee Convention and INA § 243(h) obligate the United States not to return her to El Salvador if her fears are well-founded.

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[318] In Conclusion No. 30, the UNHCR Executive Committee:

> (f) Recognized that while measures to deal with manifestly unfounded or abusive applications may not resolve the wider problem of large numbers of applications for refugee status, both problems can be mitigated by overall arrangements for speeding up refugee status determination procedures, for example by:
>
> (i) Allocating sufficient personnel and resources to refugee status determination bodies so as to enable them to accomplish their task expeditiously, and
>
> (ii) The introduction of measures that would reduce the time required for the completion of the appeals process.

Conclusion No. 30, *supra* note 309, para. f, at 26.

[319] Similar issues have been debated in Europe for years under the rubric of the "country of first asylum" doctrine, and the debate there suggests the legal and political intricacies that can be implicated. *See generally* Vierdag, *The Country of "First Asylum": Some European Aspects*, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s 73 (D. Martin ed. 1988); Conclusion No. 15(XXX), *Refugees Without a Country of Asylum*, 34 U.N. GAOR Supp. (No. 12A) at 17, U.N. Doc. A/34/12/Add.1 (1979).

[320] *See generally* J. FRIEDLAND & J. RODRIGUEZ Y RODRIGUEZ, SEEKING SAFE GROUND: THE LEGAL SITUATION OF CENTRAL AMERICAN REFUGEES IN MEXICO 55 (1987); P. FAGEN & S. AGUAYO, CENTRAL AMERICANS IN MEXICO AND THE UNITED STATES: UNILATERAL, BILATERAL, AND REGIONAL PERSPECTIVES (1988).

In the end, therefore, a "transit" doctrine would not obviate a ruling on the merits, at least with respect to the *nonrefoulement* obligation. It would only delay such a ruling and, in the meantime, possibly complicate diplomatic relations with Mexico.

3. Ending Work Authorizations and Making Alternative Arrangements for Subsistence Pending Adjudication

Government policymakers may yet perceive a need for some decisive step to send a deterrent message at times of sudden influx. Many INS personnel interviewed for this study volunteered a ready solution along these lines: simply end the work authorizations that are now fairly automatic for asylum seekers during the pendency of their claims (both initially and on appeal).[321] Additional evidence also supports the theory that the recent rise in filings is at least partially linked to the work authorization issue.[322]

A simple end to work authorizations, however, or a raising of the threshold to qualify beyond the "nonfrivolous" standard now contained in the regulations,[323] will neither fully solve the problem nor likely be sustained by the courts, unless other steps are also taken. Before the rules were amended in 1987 to make work authorization nearly automatic, district directors had considerable discretion in granting such permission. In *Diaz v. INS*, however, a district court issued a preliminary injunction against restrictive implementation, finding that a restrictive policy unduly burdened the alien's statutory right to apply for asylum and thereby frustrated the goals of the statute.[324] The nondiscretionary 1987 regulations were issued at least in part to conform to *Diaz*.[325]

Nothing has happened since then to undercut the court's reasoning. It is indeed quite plausible to read Congress's enactment of § 208 in 1980 as creating a right for persons physically present in the United States to have their asylum claims heard on the merits. If work authorization is now to be denied, any lawyer for the Department of Justice is bound to be asked in court how the government expects asylum seekers to survive during the months (and possibly years) until a final ruling is obtained on the application. Unless the government takes further steps to provide for such people during the pendency of the claim, the lawyer has no respectable answer.[326] Courts might easily conclude that the government was trying to starve people out of pursuing a congressionally mandated right. And they would surely point out that a no-work-authorization policy falls as heavily on bona fide refugees as on the abusers who are the ostensible targets.[327]

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[321] *See* 8 C.F.R. §§ 274a.12(c)(8) (1989) (providing for employment authorizations in increments not exceeding one year for any alien who has filed a non-frivolous application); 8 C.F.R. § 274a.13(d) (1989) (requiring adjudication of the employment authorization application within 60 days, the failure of which will result in a grant of interim employment not to exceed 120 days). An INS memorandum elaborates on the standards used to determine frivolousness. *See* Memorandum from Richard E. Norton, *supra* note 146.

[322] *See, e.g.*, B. Frelick, *supra* note 214, at 17.

[323] *See* 66 INTERPRETER RELEASES 4 (1989); Memorandum from Richard E. Norton, *supra* note 146.

[324] *See* Diaz v. INS, 648 F. Supp. 638, 651-53, 656 (E.D. Cal. 1986).

[325] *See* Memorandum from Ignatius Bau and Robert Rubin, *supra* note 215, app.

At times of heavy influx, a policy of near-automatic work authorizations may well be ended, but the government must then provide alternative arrangements for feeding and housing the asylum seekers. Obviously, this course would be expensive, but it could be adopted in the hope that it would slow new arrivals and minimize overall long-term costs. If such a course is chosen, these alternatives could be provided in two ways. The first would be to detain asylum seekers physically under the relevant portions of the immigration statutes. Current regulations already provide for a presumption of detention for excludable aliens who arrive without documents.[328] The bonding provisions governing deportation probably also allow the Attorney General sufficient discretion, particularly during what could plausibly be argued are emergency conditions, to arrange for

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II at 882-86 (explanation of the significance of the 1987 regulations by the attorneys involved in *Diaz*).

[326] The problem is compounded because asylum seekers are not considered to be "permanently residing under color of law" (PRUCOL), which is a prerequisite to qualifying for most federally funded public benefit programs. *See* 20 C.F.R. § 416.1618 (1989); *see also* Sudomir v. McMahon, 767 F.2d 1456, 1466 (9th Cir. 1985); Wheeler, *Alien Eligibility for Public Benefits: Part I,* IMMIGR. BRIEFINGS, Nov. 1988, at 3-4; Stein & Zanowic, *Permanent Resident Alien Under Color of Law: The Opening Door to Alien Entitlement Eligibility,* 1 GEO. IMMIGR. L.J. 231 (1986). These federal statutory restrictions sharply distinguish U.S. practices from those of most European countries, which routinely provide subsistence allowances and other benefits for asylum seekers within the general schemes they have for public assistance. This difference helps explain European countries' more ready resort to denials of work authorization to asylum applicants, even though such denials clearly impose a larger burden on the taxpayers.

[327] *See Diaz,* 648 F. Supp. at 655-56.

[328] *See* 8 C.F.R. §§ 212.5(b), 235.3(b) (1989).

detention of a large proportion of those asylum seekers who have already made an entry into the United States.

The second framework would emphasize the voluntary nature of the communal shelter and feeding facilities. It would be set up primarily to assure that no asylum seekers go hungry while awaiting a ruling on their asylum claims. If they cannot provide for themselves through personal resources or the resources of friends and family, asylum seekers could move into the governmental facilities. For those who choose this course, some kind of daily check-in procedure might be used to verify identities and to maximize the chances that individuals can be located when a deportation order becomes final. Presumably, they could come and go at their discretion during the day. (West Germany uses such arrangements in the communal housing facilities it has established for asylum seekers.) This course of action would probably cost less in direct government payouts because a fair number of asylum seekers would prefer to move in with their families. Of course, many of those not in the government facility might well attempt to work surreptitiously or with false documents. Moreover, this course of action would probably also increase the absconding rate once final deportation orders begin to issue.

Under either course, there will obviously be a need to locate considerable government facilities for housing, but there is a well-worn path of experience here, extending back to the 1975 refugee emergency caused by the fall of Saigon and the 1980 Mariel boatlift. The current population of asylum seekers should, of course, be considerably easier to deal with than the Mariel population, which included some inmates fresh from Cuban jails. Steps should be taken to make the new facilities as comfortable as possible under the circumstances, and to minimize some of the pathologies that are generated when enforced idleness and close quarters continue for lengthy periods. For example, it would be advisable to keep families together and to provide access, whenever possible, to cooking facilities, so that the individuals could prepare their own meals. The detainees are not felons, and the government might garner wider public support for any such deterrence policy if it attempts to ameliorate camp conditions as much as possible.[329]

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[329] This policy appears consistent with what the Select Commission on Immigration and Refugee Policy had in mind when it proposed creation of asylum "processing centers." *See* SELECT COMMISSION, *supra* note 69, at 166-68. Moreover, the government gained some further experience in establishing facilities of this sort in South Texas in early 1989, as part of its response to the sharp increase in asylum seekers arriving there. While the Department of Justice detained many of these

Of course, one possible objection is that any steps to ameliorate conditions limit the deterrent impact. That risk is worth taking. The main deterrents will remain denial of work authorization (which should be widely publicized through available media in the region of origin), and new measures to hasten final decisions, which would accelerate both the return of the unqualified applicants to their homelands and the release of those who merit asylum.

In the end, the difficulties and disadvantages of any such policy should not be minimized. Outright detention clashes glaringly with the proud heritage symbolized by the Statue of Liberty. Less harsh communal housing, at public expense, is apparently hard to sustain politically, for it can be portrayed as a pure welfare program for illegal immigrants, fed and sheltered entirely at taxpayer expense. Either course makes sense only as a temporary palliative; it would be much better to avoid them altogether. Avoidance is possible, in the long run, if an effective and expeditious adjudication system, as sketched above, can be patiently implemented and sustained. That sort of system allows for deterrence through the prompt deportation of the unqualified, rather than through enforced idleness (at mounting governmental expense) while adjudication grinds slowly onward.

V. CONCLUSION

Government officials reading through all the proposals offered here may be struck by the apparent cost of the system envisioned, compared to what we seem to have today. Until now, asylum responsibilities have been assumed by a mere handful of harried examiners in district offices and by the surprisingly small corps of immigration judges who shoehorn asylum in among their many other responsibilities. The true costs of the present system, however, are much higher. They include not only the costs to localities in Florida, Texas, and California that are scrambling to meet the elemental needs of asylum seekers now applying in much higher numbers, but also the costs that are likely to accrue in the future as the magnet effect compounds.[330] Absent effective adjudication reforms, we are

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people in jail-like facilities, it also set up a more open Alien Shelter Care Program, available mainly to families and unaccompanied minors. *See Justice Department Announces Funding for Services for South Texas Aliens*, 66 INTERPRETER RELEASES 720 (1989).

[330] *See* Appendix. *See generally* General Accounting Office Letter to Sen. Bob Graham (Feb. 23, 1989) (GAO/GGD-89-54FS) (recounting financial effects of asylum applicants on Miami); Schmalz, *Miami Pupils: Future Hope is Crisis Now*, N.Y. Times, Mar. 21, 1989, at A1, col. 2; McCoy, Christie & de Cordoba, *In Miami, Rivalries of*

unlikely to escape an expensive detention or government accommodation scheme whenever the flow reaches a high level, as the government's response to the spike in applications during the winter of 1988-89 demonstrated.[331]

The costs required to implement the reformed system are worthwhile if the changes can break the vicious circle in which asylum policy now seems to be caught. Quicker, seemingly cheaper fixes are wholly illusory. They were tried in the Haitian Program of 1978. The result was only years of litigation, preliminary injunctions, remands, and duplicative reconsideration, topped off by a major award of attorneys' fees to the asylum seekers' counsel.[332] The courts have repeatedly shown that they will intervene unless the asylum "problem" is addressed by a comprehensive program that demonstrates adequate seriousness about our Statue of Liberty tradition. Such seriousness inevitably costs money.

Refugee advocates encountering these proposals will probably be struck instead by the possible removal of several layers of comforting checks and appeals. Those checks have probably been effective in assuring that bona fide refugees are not sent home, particularly if a skilled advocate makes full use of all possible avenues of attack. But the cost has been high. It has meant the creation of a system that has great difficulty actually sending *anyone* home. Now that this latter message has been received in Central America (and to some extent all over the globe), the flow will probably continue to rise, until political backlash imposes its own correctives—correctives likely to be far more draconian. The effort here is to find ways to minimize the magnet effect without impairing the quality of the judgment on the merits of the asylum claim. Indeed, the steps proposed here, if properly implemented and carefully monitored, should significantly improve the accuracy and fairness of decisionmaking, despite the streamlining of the system and the trimming of layers of review.

This proposed system, centered on a nonadversarial model of adjudication, obviously places great reliance on the role of the single adjudicator. One refugee lawyer, apprised of an early version of

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Minority Groups Fan Riot's Flames, Wall St. J., Jan. 20, 1989, at 1, col. 4; Thompson, *Black Anger at Refugees Fed Riots,* Wash. Post, Jan. 20, 1989, at A3, col. 1; Applebome, *supra* note 4.

[331] In February 1990, in response to a new increase in applications, INS announced the resumption of more systematic detention of asylum applicants. *See* Suro, *U.S. Is Renewing Border Detentions,* N.Y. Times, Feb. 8, 1990, at A22, col. 1.

[332] *See supra* note 3.

these proposals, marveled: "You would really have to have trust" in the officials running the procedure. Exactly. Asylum adjudications have been conducted for years in such an atmosphere of profound and mutual mistrust that we may have great difficulty even conceptualizing such a system. But if we are to show true fidelity to the best of our asylum tradition, we have to find a way to create a system that merits our confidence. Other systems are too cumbersome to work effectively—at least when the asylum applicant intake reaches 100,000 per year.

Asylum determinations should be made by carefully chosen and well-trained specialists who possess focused responsibility for fulfilling our legal obligations and for implementing consistent, coherent, and accurate policy. Courts must develop a more deferential stance toward that expertise. It is time to create a system that will, at long last, merit such deference and trust, even on issues that will remain hotly controversial and about which we, as Americans, rightly care deeply.

APPENDIX

ASYLUM ADJUDICATION REFORM: COST ESTIMATES
(AS OF JUNE 1989)

I. COSTS OF THE PRESENT ASYLUM ADJUDICATION SYSTEM

A. *Adjudication Costs (in millions of dollars)*

Executive Office of Immigration Review (EOIR) (Includes immigration judges and Board of Immigration Appeals)	$10.0
INS: Trial attorneys and support staff	4.0
District offices	3.0
Central office	0.5
Asylum Policy and Review Unit, Department of Justice	0.5
Asylum office, Department of State	0.5
TOTAL	$18.5

Financial data for the various units of the Justice Department and State Department are not kept in a manner that readily permits identification of those costs associated with asylum adjudication. These figures therefore set forth rough, but probably conservative, estimates for costs attributable to asylum adjudication for FY 1988, when the system was equipped to handle approximately 20,000-30,000 applications, based upon telephone interviews with officials in each affected department.

NOTE: This list makes no provision for detention, deportation, Coast Guard interdiction, assistance to persons eventually granted asylum, or state and local government expenditures.

B. *Detention*

Detention costs $30-35 per person per day. Therefore detention of 4500 individuals for one week costs the federal government $1 million. During May 1989, INS was detaining an average of about 3700 asylum seekers in South Texas alone.[1] Other areas of heavy concentration of asylum seekers (notably metropolitan Miami and southern California) also give rise to substantial numbers of detainees.

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[1] *See* REFUGEE REPORTS, May 19, 1989, at 8.

C. *State and Local Government Costs*

The arrival of large numbers of asylum seekers in a concentrated period can have a considerable effect on local government expenditures for which there is no readily available federal reimbursement. No overall figures are available, but a GAO report examining the effect on the Miami-Dade County area of recently arriving Nicaraguans, who came in large numbers beginning in mid-1988, provides an illustrative picture of such local costs.[2]

GAO reported an estimated $4 million in social services provided by Dade County to Nicaraguan asylum seekers in calendar 1988 (averaging over $10,000 per day). This figure does not include educational expenses, which were expected to be high. In addition, the city of Miami reported spending $4,000 a day on recent Nicaraguan arrivals. Thus, not counting educational costs, local government in the Miami area incurred expenses of over $14,000 per day for Nicaraguan asylum seekers during the 1988-89 influx.[3]

II. ESTIMATED COSTS FOR REFORMED ADJUDICATION SYSTEM

Because the recommendation proposes that asylum adjudicators be equivalent in rank and salary to immigration judges, the following estimates for adjudicators are based on figures provided by EOIR for full costs of additional immigration judges and support personnel. It is estimated that thirty adjudicators would be needed to handle each increment of 10,000 asylum decisions[4] per year (333 cases per adjudicator per year or approximately seven cases per week).

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[2] GENERAL ACCOUNTING OFFICE, POLITICAL ASYLUM APPLICANTS: FINANCIAL EFFECT ON LOCAL SERVICES IN THE MIAMI AREA (1989).

[3] This GAO report sets forth costs only for *Nicaraguans* in the Miami area, although Haitian and other asylum-seekers had been arriving in increasing numbers there. (The Miami district office of INS then ranked second in asylum application receipts among district offices, receiving 8,214 asylum applications in FY 1988 and an estimated 15,000 in 1989; the Los Angeles office was first with 28,491 applications in FY 1988 and an estimated 34,000 in 1989.)

[4] Roughly 10 to 20 percent of asylum applications are withdrawn or abandoned before decision. Therefore 10,000 *decisions* should keep pace with 11,000 to 12,500 *applications*.

Adjudication Costs (in millions of dollars) (for 30,000 decisions per year)

General administration and program direction	$1.0
Adjudication division	
Adjudicators	9.0
Support staff for adjudicators	7.5
Appellate division	
Board members and immediate staff	0.5
Staff attorneys and other support staff	4.5
Documentation center	1.0
TOTAL	$23.5

The estimate assumes a capacity of 30,000 decisions per year, to show costs that would be comparable to the upper estimate of capacity for the current system as it operated in FY 1988. If the lower estimate were used instead for comparison (a caseload of 20,000 decisions), the reformed system would cost $16.5 million.

Actual adjudication output requirements will surely be higher, at least in the early years, given the 1989 application rate. Once the new system is fully operational, however, it should reduce the number of asylum applications and diminish or eliminate the need for detention as a deterrent, thus saving substantial federal expenditures.

To SS 9-5-89

WHICH AGENCY INTERPRETATIONS SHOULD BIND CITIZENS AND THE COURTS?

by

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I. INTRODUCTION AND SUMMARY

Agencies continually interpret the statutes they administer. Their interpretations are expressed in a great variety of forms -- in legislative regulations, adjudicatory opinions, manuals, court briefs, interpretive rules, policy statements, staff instructions, opinion letters, audits, correspondence, informal advice, guidelines, press releases, testimony before Congress, internal memoranda, speeches, explanatory statements in the Federal Register, and others.

This Article considers the extent to which these varied forms of agency interpretive expression, sometimes referred to as "formats," should be accepted or accorded some sort of consideration by the courts that review them.

This inquiry is part of a larger one, which forms its context: Under what circumstances should it be the agencies, rather than the courts, that place definitive interpretations upon federal statutes? Put another way, when is a reviewing court bound to accept the agency's interpretation?

Interpretation of a statute presents a question of law, and "[i]t is emphatically the province and duty of the judicial department to say what the law is."[1] "[O]ne of the judiciary's characteristic roles is to interpret statutes * * * ."[2] But in reviewing interpretations placed upon statutes by the agencies that administer them, the courts for many decades have accorded respectful attention or even controlling effect to such agency interpretations.[3]

In some situations, the court deems itself bound to accept the agency's interpretation outright, thereby giving it controlling effect, provided only that it is consistent with statute and is reasonable. In other cases, the court reserves the power to arrive independently at its own interpretation; it should give respectful consideration to the agency's construction, but may reject it, even if it seems a reasonable one.[4]

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[1] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (per Marshall, C.J.).

[2] Japan Whaling Ass'n v. American Cetacean Soc'y, 106 S.Ct. 2860, 2866 (1986).

[3] "[C]ourts do not necessarily abdicate a Marshallian duty to 'say what the law is' by deferring to agencies. Courts retain the authority to control administrative abuses of power; deferential review simply recasts the question of law as whether the agency's interpretation is 'reasonable'." Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, 569 (1988), quoting Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1, 27-28 (1983). See also Levin, Identifying Questions of Law in Administrative Law, 74 Geo. L. J. 1, 21 (1985).

The law governing judicial acceptance of agencies' interpretations of the statutes they administer is now dominated by Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.[5] This case has been cited by the Supreme Court dozens of times, and by the lower federal courts, hundreds. Chevron is understood to require a reviewing court to accept an agency interpretation that (a) is not contrary to statute or specific statutory intent and (b) is reasonable. (I shall refer to this judicial process as "Chevron acceptance" of the agency interpretation.)

This understanding unquestionably governs the usual case in which the agency, in pursuance of delegated authority, issues its interpretation through a legislative regulation or other agency action possessing the force of law.[6] But what if the same interpretation -- identical in its substantive content -- were expressed only in an opinion letter, a policy statement, a press release, or an amicus brief?

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[4] Cases and commentary have confusingly used the term "deference" to refer to both of these approaches, even though they imply different roles for the reviewing court. Indeed, the courts often have been quite unclear about which approach they were following. For precision, I will refer to the first approach as "acceptance", or sometimes in more specific contexts as "Chevron acceptance" or "Hearst acceptance." See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984); NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). I shall call the second approach "special consideration," or more specifically "Skidmore consideration." See Skidmore v. Swift & Co., 232 U.S. 134 (1940). Under the analysis presented in this Article, there can be a third approach. In cases of pre-enforcement review, where the court does not need to make a final and complete interpretation, it may limit its review to the question of whether the agency's interpretation is demonstrably wrong, without deciding whether it is right or acceptable. See text at notes 182-183, infra.

[5] 467 U.S. 837 (1984) (6-0 decision; opinion by Stevens, J.; Marshall, Rehnquist and O'Connor, JJ. not participating).

[6] An agency interpretation "has the force of law", and therefore is "binding" upon the courts (as well as upon the public and upon the agency itself), when a court may not review it freely, but must accept it unless it is contrary to statute or unreasonable. A legislative regulation issued pursuant to delegated statutory authority is an example of agency action possessing these characteristics. See Batterton v. Francis, 432 U.S. 416, 425-26 (1977) quoted at note 17 infra. See also Chrysler Corp. v. Brown, 441 U.S. 281, 301-04 (1979).

It would be the rare case in which the agency possessed congressionally delegated authority to make definitive interpretations, carrying the force of law, through such informal issuances. Nevertheless a reviewing court -- under a broad and perhaps uncritical reading of Chevron -- might feel compelled to accept an interpretation of this type, without regard for the agency's lack of delegated authority to issue authoritative interpretations through such informal formats. A number of courts have done so.[7]

Such a reading of Chevron is possible because its language suggests that, if the reviewing court cannot find specific congressional intent on the precise point at issue, but rather finds the statute to be silent or ambiguous on that point, it should presume that Congress delegated to the agency the interpretive authority to fill the gap, and must therefore accept any reasonable agency interpretation.[8] It is then but a short step, perhaps unconsciously taken, to assume that this implied delegation requires acceptance of the interpretation without regard for the format in which it is expressed.

Should the courts under Chevron be bound to accept (and not merely to consider) reasonable agency interpretations expressed in informal formats? The present study addresses this question, and yields generally negative answers. Where the format is an informal one, it ordinarily does not carry the force of law, and a reviewing court is not bound by the agency interpretation, though it should give special consideration to the agency opinion.

The threshold issue for the court is always one of congressional intent: did Congress intend the agency's interpretation to bind the courts? The touchstone in every case is whether Congress intended to delegate to the agency the power to interpret with the force of law in the particular format that was used.

Sometimes the reviewing court will conclude that Congress has mandated or prohibited a specific substantive position. In such a case, obviously, the court cannot find that Congress intended a delegation to the agency to interpret inconsistently, and an agency interpretation may enjoy the force of law if it conforms to the substantive congressional intent. In every other case, however, an agency interpretation that claims the force of law must be grounded in an adequate delegation.

When looking for delegation, the reviewing court must of course first satisfy itself as to the agency's delegated authority to make binding interpretations with respect to the subject matter. Under Chevron, though, such a delegation may be presumed from the mere existence of a "gap" -- statutory silence or ambiguity on the point at issue. More important for present purposes, the court must also identify a delegation of power to make binding interpretations through the particular format chosen by the agency: Did Congress authorize the agency to make law through this format? Any difficulty in answering this question cannot justify a failure to ask it. That Congress's delegatory intent must sometimes be sought through inference and construction, rather from direct manifestations of congressional will, does not diminish the indispensability of this inquiry. Under our system of limited government, an agency cannot announce actions that bind citizens and the courts unless Congress (or the Constitution) has delegated to it the authority to do so.

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[7] Text at notes 187-196, infra.

[8] Chevron, 467 U.S. at 843-44, quoted at note 61 infra.

The needed delegation is unlikely to be found for agency interpretations expressed through informal formats.[9] But, unless the courts insist upon a delegation as to format as a condition of Chevron acceptance, interpretations set forth in informal formats would command as much force as do legislative regulations, and agencies could freely avoid the public procedures and safeguards required for issuance of such regulations. Worse, the courts would accord binding force to actions that Congress had not authorized to have binding force.

Part II of this Article reviews pre-Chevron law concerning judicial consideration of agency interpretations. Part III analyzes the Chevron doctrine and the experience under it, with emphasis on the role of the delegation inquiry. Part IV brings a close focus upon the assortment of formats in which agency interpretations are set forth. It demonstrates how the delegated authority for the use of each format should determine whether the reviewing court must accept the agency interpretation or need only give it special consideration.

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[9] In the rare case, an informal interpretive format may be entitled to judicial acceptance because Congress intended that such informal interpretive expressions be authoritative and bind the courts if not irrational. See Ford Motor Credit Co. v. Mulhollin, 444 U.S. 555, 566-67 (1980). But this apparent exception simply proves the rule, since a congressional delegation had invested the informally expressed agency interpretation with the force of law. See text accompanying note 153-172, infra.

II. PRIOR PATTERNS OF ACCEPTANCE AND DEFERENCE

No pre-*Chevron* case articulated a consistent or comprehensive statement of doctrine, like that ventured in *Chevron*, on these subjects. Judicial attitudes reflected in the opinions range from a near-abject acceptance,[10] to a skeptical consideration of agency views,[11] to an ignoring of them altogether.[12]

Sometimes the judicial language sweepingly called for acceptance, but at the same time identified the specific circumstances inducing acceptance, leaving doubt about the rule of acceptance where such circumstances were not present.[13]

At other times, the opinions spoke not of outright acceptance but of degrees of "deference" or "weight" to be granted the agency interpretations.[14] In these instances the "decision whether to grant deference depends on various attributes of the agency's legal authority and functions and of the administrative interpretation at issue."[15] But the pre-Chevron cases were habitually unclear in indicating the point at which the weight or deference due would compel acceptance of the agency interpretation (provided, of course, it was reasonable and consistent with statute).[16]

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[10] *E.g.*, Bates & Guild Co. v. Payne, 194 U.S. 106, 108-9 (1904), *quoted in* United States v. Shimer, 367 U.S. 374, 381-82 (1961).

[11] *E.g.*, Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946).

[12] *E.g.*, Packard Motor Car Co. v. NLRB, 330 U.S. 469 (1947).

[13]
> [T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially where Congress has refused to alter the administrative construction.

Red Lion Broadcasting, Inc. v. FCC, 395 U.S. 367, 381 (1969) (upholding legislative regulation). A striking post-*Chevron* example of such a juxtaposition is found in NLRB v. United Food & Commercial Workers Union, 108 S.Ct. 413, 421 n. 20 and accompanying text (Dec. 14, 1987).

[14] *E.g.*, Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 98 n. 8 (1983) ("[A]n agency acting within its authority to make policy choices consistent with the congressional mandate should receive considerable deference from courts * * *"); Zuber v. Allen, 396 U.S. 168, 192 (1969) ("While this court has announced that it will accord great weight to a departmental construction of its own enabling legislation, * * * it is only one input in the interpretational equation").

It would not be possible, even if it were fruitful, to posit an analysis that harmoniously explained all the pre-Chevron cases. But some rather clear patterns are evident. These are best perceived in terms of the formats in which the agency interpretations were expressed. Where agencies exercised delegated power to pronounce interpretations in formats bearing the force of law, reviewing courts accepted those interpretations, provided they were reasonable and consistent with statute. In other formats, the courts accorded special consideration to the agency interpretations, but approved them only if persuaded that they were correct.

A. LEGISLATIVE REGULATIONS

The agency interpretation has regularly been accepted when set forth in a legislative regulation issued pursuant to delegated authority to promulgate rules with the force of law. For example:

> Unlike the statutory term in Title II, however, Congress in § 407 (a) expressly delegated to the Secretary the power to prescribe standards for determining what constitutes "unemployment" for purposes of AFDC-UF eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside these regulations simply because it would have interpreted the statute in a different manner.
> * * * .

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[15] Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, at 562 (1985). See notes 51-52 and accompanying text, infra.

[16] Even in an opinion that went to some pains to elucidate the issues of "deference," for example, the Court made this typical statement: "The interpretation put on the statute by the agency charged with administering it is entitled to deference, * * * but the courts are the final authorities on issues of statutory construction." FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 31-32 (1981).

But see, e.g., Fulman v. United States, 434 U.S. 528, 533 (1978) (contemporaneous Treasury Regulations must be sustained unless unreasonable or plainly inconsistent with the revenue statutes).

> The regulation at issue in this case is therefore entitled to more than mere deference or weight. It can be set aside only if the Secretary exceeded his authority or if the regulation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[17]
>
> Congress explicitly delegated to the Secretary broad authority to promulgate regulations defining eligibility requirements for Medicaid. We find that the regulations at issue in this case are consistent with the statutory scheme and also are reasonable exercises of the delegated power. The Court of Appeals therefore was not justified in invalidating them, and we reverse."[18]

Even where the statutes conferred only a general rulemaking power, rather than a specific delegation as in the quoted cases, and even where the courts did not speak expressly of delegation, the legislative regulations were accepted and upheld.[19] When such regulations were struck down, it was typically because they went beyond statutory authority, rather than because they were found to be unreasonable.[20]

B. INTERPRETATIONS EXPRESSED IN ADJUDICATORY DECISIONS

1. Adjudication of Mixed Questions

The courts also have regularly accepted agency interpretations pronounced in adjudications applying statutes to specific facts.[21] In such a determination, where the statute law is closely mixed with detailed facts, the agency's action may be more accurately viewed as an application of the statute, rather than as an interpretation in any abstract or general sense.[22] In the well-known Hearst case,[23] the issue was whether certain newsboys who sold newspapers on street corners, for their own account but under some control by the publishers, were in the specific circumstances "employees" within the National Labor Relations Act. The agency held that they were, and the Court accepted the agency view. It stated that the detailed determination of who was an "employee" was a task that had been assigned to the agency created by Congress to administer the Act, and that resolving that question "belongs to the usual administrative routine" of the National Labor Relations Board.[24] It held that "the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law."[25]

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[17] Batterton v. Francis, 432 U.S. 416, 425-26 (1977) (emphasis in original).

[18] Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981).

[19] E.g., Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973); Fulman v. United States, 434 U.S. 528 (1978); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); United States v. Shimer, 367 U.S. 374 (1961).

[20] E.g., Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944). See also a significant post-Chevron case, Board of Governors, Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361 (1986).

[21] E.g., NLRB v. Hearst Publications, Inc. 322 U.S. 111 (1944); Ford Motor Co. v. NLRB, 441 U.S. 488 (1979); Gray v. Powell, 314 U.S. 402 (1941); United States v. Louisville & Nashville R. Co., 235 U.S. 314 (1914). See also Train v. NRDC, 421 U.S. 60, 75, 87 (1975).

In these "mixed question" cases, where an agency in adjudication applies statutes to detailed and specific facts, the court accepts the agency determination, even though it implicates a legal question of interpreting the statute and even though the court might independently have reached a different result.[26] The agency determination must be accepted because Congress intended that the agency rather than the courts be vested with the authoritative responsibility to make such detailed and specific interpretations through adjudicatory decisions, and Congress thereby intended that judicial review be limited, not independent.[27] In other words, Congress expressly or impliedly delegated to the agency the primary power so to interpret, subject only to limited judicial review.[28]

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[22] Professor Schotland contrasts "law-declaring, which has to do with general construction of a statute wholly independently of the controversy at bar" and "law-applying, or applying a statute or other item of law to the particular facts at bar, * * * [which is] part of the normal particularized administration of the statute and its resolution belongs mainly to the body with the first-line responsibility for that administration." Schotland, Scope of Review of Administrative Action, 34 Fed. B.J. 54, 58 (1975).

[23] NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944).

[24] NLRB v. Hearst Publications, Inc., 322 U.S. 111 at 130, quoting Gray v. Powell, 314 U.S. 402, 411 (1941).

[25] Id. at 131. The "reasonable basis in law" element of this test can fairly be equated with the generalized formulation, mentioned throughout this paper, that an interpretation, to be judicially accepted, must be reasonable and not contrary to statute.

[26] I shall refer to this phenomenon as "Hearst acceptance" of the agency interpretation.

2. Adjudication of Pure Questions and Major Interpretive Questions

Not every type of interpretation generated in an agency adjudication has won judicial acceptance. Those involving pure rather than mixed questions, or major rather than minor issues, have usually been subjected to independent review by the courts.

We may regard an interpretive question as a "pure" one if its resolution does not depend upon the specific facts of the agency adjudication.[29] The courts appear to have presumed that such questions were within their own traditional judicial competencies and that Congress had not delegated primary interpretive authority over to the agencies.[30] Thus, where the issue under the labor statute was generically whether retirees could be "employees,"[31] or managers could be "employees,"[32] or foremen could be "employees,"[33] the Supreme Court approached these as pure questions and arrived independently at its own constructions.[34] Such pure interpretive determinations, in other words, are not assigned to the agency's "usual administrative routine"[35] so as to be entitled to judicial acceptance.

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[27] See Ford Motor Co. v. NLRB, 441 U.S. 488, 495-97 (1979); INS v. Wang, 450 U.S. 139, 144-45 (1981). See also L. Jaffe, Judicial Control of Administrative Action 549 (1965) ("a law-applying judgment is *presumptively* within the area of the agency's discretion") (emphasis in original).

[28] "Where, as here, a determination [as to whether in the specific circumstances a railroad was the 'producer' of coal it consumed] has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched." Gray v. Powell, 314 U.S. 402, 412 (1941).

[29] See note 22 *supra*. Obviously, there can be uncertainties along the borderline between "pure" and "mixed" questions, but a precise delineation is unnecessary for the present analysis.

[30]

> "When an agency's decision is premised on its understanding of a specific congressional intent, however, it engages in the quintessential judicial function of deciding what a statute means. In that case, the agency's interpretation, particularly to the extent it rests on factual premises within its expertise, may be influential, but it cannot bind a court."

Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, n. 8 (1983).

[31] Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).

Such pure questions typically are also big questions. The constructions that resolve them often shape the major anatomy of the statutes involved. Deciding whether particular newsboys in a specific setting were covered by the labor law can play only a relatively small role in the administration of the statute. The resolution of issues concerning the coverage of large generic classes like retirees or managers was fundamental.[36]

The Hearst case itself well illustrates a distinction between major and minor issues. Before addressing the situation of the newsboys, the Court independently resolved a bedrock interpretive question, holding that the term "employee" should not be construed by simple references to state or common law.[37]

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[32] NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

[33] Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).

[34] In the retired workers' and managers' cases, just cited, the Court overturned the Labor Board's decision. In the foremen's case, the Court upheld the Board, but clearly did so by using its own generic interpretation to decide "the naked question of law," 330 U.S. at 493, earlier stated as "whether foremen are entitled as a class to the rights * * * assured to employees generally by the National Labor Relations Act." 330 U.S. at 486 (emphasis added).

[35] NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130 (1944), quoting from Gray v. Powell, 314 U.S. 402, 411 (1941).

[36] "Packard * * * presented a legal question of great importance in the field of labor relations: 'Does the NLRA cover shop foremen?' This question raised political, as well as policy, concerns; it seems unlikely that Congress wished to leave so important and delicate a legal question to the Board to decide." Breyer, Judicial Review of Questions of Law and Policy, 38 Ad. L. Rev. 363, 371 (1986).

[37] NLRB v. Hearst Publications, Inc., 322 U.S. 111, 120-24 (1944). See Note, The Chevron Legacy: Young v. Community Nutrition Institute Compounds the Confusion, 73 Cornell L. Rev. 113, 116-118 (1987).

Further examples of cases independently resolving interpretive questions that were both pure ones and major ones are Board of Governors of the Federal Reserve System v. Agnew, 329 U.S. 441 (1947) and American Ship Building Co. v. NLRB, 380 U.S. 300 (1965), where the Court stated: "The deference owed to

Of course an interpretive question can be a pure one without also being a major one. The agency in Social Security Board v. Nierotko[38] had held in an adjudication that an NLRB back pay award did not constitute "wages" creditable to the claimant's Social Security account. The question was a pure one, having no dependence on specific facts of the case. The Court declined to accept the agency's decision as "conclusive" and proceeded to interpret independently, pointing out that Congress had given the agency no delegation to determine what compensation should be treated as wages.[39] Nierotko appears to teach that the courts will not readily find a delegation to decide abstract questions through adjudication, despite the modest importance of the issue. On the other hand, it should be expected that minor questions, even if abstract, can sometimes be grist for routine agency interpretation.

An issue may be a big one but not a pure one. The Highland Park[40] case presented the question whether the Congress of Industrial Organizations (better known as the "C.I.O.") was a "national or international labor organization" the officers of which were required to file noncommunist affidavits in order to use the machinery of the NLRB. Entailing as it did the application of the statutory term to a single specific labor organization, the question arguably was a mixed one of law and fact. Yet the Court reversed the Board's adjudicative determination and held through independent interpretation that the C.I.O. fell within the statutory ban.[41] Although "the question [was] one of specific application of a broad statutory term"[42] the Court did not treat it as belonging to "the usual

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an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." Id. at 318.

For discussion of pure questions in the context of delegation analysis, see text accompanying notes 69-89 and 225-232, infra.

[38] 327 U.S. 358 (1946).

[39] Id. at 369.

[40] NLRB v. Highland Park Co., 341 U.S. 322 (1951).

[41] The majority opinion entirely ignored the Board's reasoning. Justices Frankfurter and Douglas dissented on the ground that the NLRB's determination was reasonable and therefore should have been accepted. Id. at 326-28.

[42] NLRB v. Hearst Publications Inc., 322 U.S. 111, 131 (1944).

administrative routine".[43] The issue of whether to apply the statute to the nation's largest labor organization was apparently too momentous to permit an assumption that Congress had delegated the primary interpretive power to the agency.[44]

3. Summary

Overall, the Supreme Court marked out a discernible pattern in the pre-Chevron cases involving agency adjudicative interpretations: Where the agency adjudication purported to resolve a pure question or a major question of interpretation, the reviewing court would probably interpret independently,[45] unless it clearly found that Congress had delegated the primary decision of such questions to the agency.[46] Where the adjudication decided a mixed question of applying broad statutory language to specific fact, the court would accept the agency view, except perhaps where large consequences carried the matter beyond the routine within which the agency was assumed to possess a delegated power.

The pivotal question in these cases was whether Congress intended the agency, in the particular circumstances, to have the primary power to construe the statute through adjudication. Such a delegatory intent is most naturally found where the issue is a mixed one. The agency has the relatively modest duty of applying the statute in the exercise of its administrative routine. Congress is much less apt to want the agencies to control the courts' determination of the grand questions or the pure ones.

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[43] Id. at 130.

[44] "An implied delegation of a law-declaring function is especially likely where, as here, the question is interstitial, involves the everyday administration of the statute, implicates no special judicial expertise, and is unlikely to affect broad areas of the law." St. Lukes Hospital v. Secretary of HHS, 810 F.2d 325, 331 (1st Cir. 1987) (Breyer, J.)

[45] The court of course would give special consideration to the agency's interpretation and affirm it if it proved to be correct. See discussion of "Skidmore consideration", text at notes 47-52, infra.

[46] See Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946). A delegated power to promulgate legislative rules does not in itself confer a delegation to promulgate binding general propositions of law through adjudication. See Berg, Re-Examining Policy Procedures: The Choice Between Rulemaking and Adjudication, 38 Admin. L. Rev. 149, 169-78 (1986).

C. OTHER INTERPRETATIVE FORMATS

As shown, agency interpretations have been accepted where they were expressed in legislative regulations or, often, in adjudicative determinations. In other formats, where the agency action does not carry the force of law, "administrative interpretations of statutory terms [were] given important but not controlling significance"[47] by courts in arriving at their own interpretations. The special consideration so given the agency construction does not, of course, lead mechanically to acceptance or rejection of the agency view. Rather, as expressed in Skidmore v. Swift & Co.,[48] that view should be given the significance it deserves:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.[49]

I shall call this process of judicial analysis "Skidmore consideration." Under this approach, the agency interpretation is a substantial input and counts for something, much as does legislative history. But the authoritative act of interpretation remains that of the court. The court considers the agency view, and approves it only if it is deemed correct.[50]

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[47] Batterton v. Francis, 432 U.S. 416, 424 (1977).

[48] 323 U.S. 134 (1940). The agency interpretations in the Skidmore case were set forth in an "interpretative bulletin" (interpretive rules), "informal rulings" and a brief amicus curiae.

[49] Id. at 140. Professor Diver comments: "Of course, the 'weight' assigned to any advocate's position is presumably dependent upon 'the thoroughness evident in its consideration' and the 'validity of its reasoning.'" Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, 565 (1985).

[50] The same approach was observed in another leading case, in which interpretive guidelines published in the Code of Federal Regulations were overturned:

> In evaluating this contention [that "great deference" should be accorded the agency view] it should first be noted that Congress, in enacting Title VII, did not confer upon

Under Skidmore, the weight given the agency interpretation, and the ultimate determination to adopt it as correct or to overturn it, usually depends on a variety of circumstances or "factors", such as the importance of agency expertise, contemporaneity of the interpretation with enactment of the statute, longstanding application and consistency of the agency interpretation, the possibility of congressional acquiescence, and numerous others.[51] These factors are often the same as those which, in other contexts, could help the court determine whether Congress delegated interpretive authority to the agency, or whether the agency interpretation was a reasonable one.[52]

> the EEOC authority to promulgate rules or regulations pursuant to that Title. This does not mean that EEOC guidelines are not entitled to consideration in determining legislative intent. But it does mean that courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law, or to regulations which under the enabling statute may themselves supply the basis for imposition of liability. The most comprehensive statement of the role of interpretative rulings such as the EEOC guidelines is found in Skidmore v. Swift & Co., where the Court said [quoting the passage from that case set forth above].

General Electric Co. v. Gilbert, 429 U.S. 125, 141-42 (1976). See also Fishgold v. Sullivan Drydock Repair Corp., 328 U.S. 275, 290 (1946): "Rulings" in the Director of Selective Service's memoranda to Local Boards "may be resorted to for guidance" but "are not made in adversary proceedings and are not entitled to the weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making inter partes decisions."

[51] Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, at 562 n. 95 (1985) presents a "partial list" of ten such "factors." See also General Electric v. Gilbert, 429 U.S. 125 (1976).

[52] Such factors are usefully grouped as 1) those affecting the probability that the agency's interpretation was sound (e.g., that the agency had helped draft the statute or had interpreted it soon after enactment under the eye of Congress; that the agency's interpretations were consistent and of long standing; that the agency position is well-reasoned) and 2) those affecting the likelihood that Congress intended to delegate interpretive authority to the agency (e.g., technical nature of the issue; complexity of the statute; need to reconcile conflicting statutory policies in administration; absence of constitutional issues). See Note, Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. NRDC, 87 Colum. L.

D. TOWARD CLARITY IN THE PRE-CHEVRON LAW

Reliance on such a process of weighing multiple and perhaps incommensurable factors can yield unpredictable results and unsure doctrine.[53] This is unavoidable, but tolerable, provided it is clear in each case what question the weighing process is aiming to resolve. The pre-Chevron uncertainty was compounded, however, by imprecise and inconsistent judicial language. No Supreme Court case had set forth a comprehensive statement to guide the review of agency interpretations. The relevant pronouncements were partial and varied, scattered among the cases.

Two tendencies were especially inimical to clarity. First, the pre-Chevron opinions suggested that the reviewing courts through the weighing process should recognize degrees of deference,[54] even though the issues were not those of degree but were binary: did the agency possess delegated interpretive power, or not? was the agency interpretation reasonable, or not? was the agency interpretation correct, or not? Second, the opinions did not differentiate among these three issues by indicating which "factors" were to be heeded, and how they were to be used, in the resolution of each respective issue.[55] Instead, the opinions typically spoke in general language, as though the same approaches and the same considerations applied to all agency interpretations.[56]

Such language lent itself to confusion and misunderstanding. It tended to blur the distinction between those interpretations that should be examined for reasonableness and those to be examined for correctness. It could be taken to justify a subjective judicial approach, emphasizing reasonableness. And, overall, these opinions intimated the existence of a generalized concept of "deference" for all cases, seemingly urging that any

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Rev. 986, 996-999 (1987) (by Eric Braun).

[53] See Anthony, Towards Simplicity and Rationality in Comparative Broadcast Licensing Proceedings, 24 Stan. L. Rev. 1, 39-45 (1971).

[54] See cases cited in notes 13-14 supra. See also Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 97-98 and n. 8 (1983); Watt v. Alaska, 451 U.S. 259, 273 (1981).

[55] See Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566-69 (1980); Train v. NRDC, 421 U.S. 60, 75, 87 (1975); NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974).

[56] See Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 98 n. 8 (1983); Watt v. Alaska 451 U.S. 259, 272-73 (1981); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566-69 (1980); Griggs v. Duke Power Co., 401 U.S. 424 433-34 (1971).

agency interpretation, once found reasonable and consistent with statute, should be accepted by the reviewing court.[57]

But the review of agency interpretations can be more concisely summarized, consistently with the outcomes if not always with the pronouncements of the pre-Chevron decisions. In each case the comprehensive inquiry was, in effect, to determine Congress's "interpretive intent."[58] That is, did Congress intend that such an interpretation, in the format used, should bind the courts? An agency interpretation would be upheld if it 1) expressed a substantive congressional intent on the point, or 2) was not contrary to statute, was within authority delegated to the agency to interpret with the force of law in the format used, and was reasonable, or 3) accorded with the court's independent construction. This broad structure continues after Chevron.

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[57] See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969); Udall v. Tallman 380 U.S. 1, 16 (1965); Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1, 30 (1983).

[58] This useful phrase is suggested for a slightly different context by Note, Coring the Seedless Grape: A Reinterpretation of Chevron v. U.S.A. Inc. v. NRDC, 87 Colum. L. Rev. 989 (1987) (by Eric Braun), defining the term as "Congress' preference for resolution of statutory gaps by the courts or by the agency." Id. at 996 n. 82.

III. THE CHEVRON DOCTRINE

The Court in Chevron reviewed Environmental Protection Agency legislative rules that set forth the agency's interpretation of a statutory term.[59] The Clean Air Act authorized and imposed limitations upon emissions from a "stationary source." The EPA regulations interpreted this statute by use of its "bubble concept," allowing the states to treat all pollution sources within the same plant as though they were comprised within a single "source," so that polluting emissions could be aggregated and netted out for purposes of complying with regulatory limits.

The District of Columbia Circuit found that Congress had no specific intent with respect to whether the term "stationary source" could be interpreted in accordance with the bubble concept. That court performed its own interpretation, based largely on the general purposes of the amended Clean Air Act, and set aside the regulations.[60]

The Supreme Court reversed, finding the regulations to be a reasonable accommodation of conflicting statutory policies in a situation where Congress had no specific intent with respect to the precise interpretive question at issue. For the Court, Justice Stevens stated:

> When a court reviews an agency's construction of the statute it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for

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[59] For clarity, it should be borne in mind that legislative rules like those in Chevron -- statutorily authorized and properly promulgated after notice and comment and having the force of law -- often embody interpretations of statutes. But they do not thereby become "interpretative rules," which carry less force and can be promulgated more informally. See Administrative Procedure Act § 4(a),(c), 5 U.S.C. § 553(b), (d)(1982).

[60] N.R.D.C., Inc. v. Gorsuch, 685 F.2d 718 (D.C. Cir. 1982).

> the court is whether the agency's answer is based on a permissible construction of the statute.
>
> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.
>
> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.[61]

The Chevron opinion thus set up a three-stage analysis to be followed by a reviewing court: (1) Is there specific congressional intent on the precise question at issue? (2) If not, is there express delegation of authority to elucidate by regulation? (3) If not, is there implicit delegation of some sort of authority to fill the gap? Courts and commentators have tended to conflate the second and third stages into a single inquiry, tested by reasonableness.[62] For terminological purposes, I will yield to the widespread usage that calls the first question "Step 1" and merges the second and third questions into a "Step 2." Since there are important reasons for keeping the latter two inquiries distinct, I will sometimes refer separately to the second question as "Step 2A" and the third as "Step 2B".

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[61] Chevron, 467 U.S. at 842-44 (quoting United States v. Shimer, 369 U.S. 374, 382 (1961)).

[62] See, e.g., International Union, UMW v. FMSHRC, 840 F.2d 77, 81 (D.C. Cir. 1988); N.R.D.C., Inc., v. Thomas, 805 F.2d 410, 420 (D.C. Cir. 1986); FAIC Securities, Inc. v. United States, 768 F.2d 352, 361 (D.C. Cir. 1985)("A permissible construction has been helpfully defined as 'one that is sufficiently reasonable to be accepted by a reviewing court'"); Starr, Judicial Review in the Post-Chevron Era, 3 Yale J. on Reg. 283, 287-88 (1986).

Considerable ambiguity attends both Steps.[63] That ambiguity has impaired the development of clear doctrine about which interpretive formats bind the courts.

A. CHEVRON'S "STEP 1"

Step 1, of course, interplays with Step 2. The smaller the scope of the issue or issues to be resolved in Step 1, the larger is the ambit of Step 2. The variation will depend upon how far the *Chevron* Step 1 language is to be read literally, to permit the court to ask only whether "Congress has directly spoken to the precise question at issue," with an intent that is "clear."[64] A literal reading straitens the scope for independent judicial interpretation in Step 1, spilling all other judicial inquiries into the Step 2 consideration of the agency's interpretation and its reasonableness.

The next three subsections examine this version of Step 1 and two variant patterns suggested by words and deeds of the Supreme Court. Two analytical aspects of each pattern are especially significant: What is the nature of the issue as to which congressional intent is to be sought in Step 1? And how clear must congressional intent concerning that question be, to bind the agency?

1. Interpreting for Conformity with Specific Intent

Under the language of *Chevron*, the question to be addressed by the court is the specific one addressed by the agency's interpretation. The reviewing court should interpret the statute only so far as is necessary to determine whether there is a clear and unambiguous congressional intent toward that precise question. The court may employ the "traditional tools of statutory construction" to ascertain the existence of such an intent.[65] If it finds specific intent on the precise question, the court should affirm or vacate the agency interpretation accordingly. But if it fails to find such intent, the court should not then use the "traditional tools" to perform an independent interpretation of the ambiguous statute. Instead, it should move to Step 2 and evaluate the agency's interpretation.

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[63] *See* Anthony, *Which Agency Interpretations Should Get Judicial Deference? -- A Preliminary Inquiry*, 40 Ad. L. Rev. 121, 126-28, 130-33 (1988).

[64] 467 U.S. at 842-43.

[65] 467 U.S. at 843 n.9, quoted in full at note 83 *infra*. According to *Chevron*, the tools of interpretation for Step 1 do not include the broad statutory purposes: imposing its own construction based on the broad purposes (where it could not find specific intent) is just what the *Chevron* Court reversed the lower court for doing. 467 U.S. at 842-44. *See* Board of

Does this doctrine make fewer than before the occasions on which a court may interpret independently? Manifestly it does, even though exact meanings cannot be placed upon the words "precise" and "specific," which limit the issues now amenable to independent resolution. Prior cases showed a tendency for the courts to interpret independently when pure questions or major questions were involved and primary interpretive authority had not been delegated to the agencies.[66] But now such issues seem less likely to be determined independently. Obviously, specific congressional intent directed to such issues often cannot be

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Governors, Federal Reserve System v. Dimension Financial Corp., 106 S.Ct. 681, 888-89 (1986) (neither court nor agency can correct statute's inadequacies in implementing putative statutory purposes). But see Chemical Mfrs. Assn. v. NRDC, 470 U.S. 116, 126 (1985) (accept agency view "unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress"); Hall v. Lyng, 828 F.2d 428 (8th Cir. 1987) (interpreting on basis of general purposes of statute). See also McNabb v. Bowen, 829 F.2d 787, 791 (9th Cir. 1987), applying dictum from FEC v. Democratic Sen. Comm., 454 U.S. 27 at 32 (1981), that courts "must reject administrative regulations * * * that frustrate the policies which Congress sought to implement."

The general purposes of the statute are of substantial importance when testing the reasonableness of the agency interpretation in Step 2. Continental Air Lines v. Dep't of Transportation, 843 F.2d 1444, 1449-50 (D.C. Cir. 1988). See text at notes 115-119 infra.

In some circumstances the agency interpretation itself can be an appropriate tool for the court's use in Step 1, as where the agency helped frame the statute, see SEC v. Collier, 76 F.2d 939, 941 (2nd Cir. 1935), and where the interpretation continues to reflect initial agency views acquiesced in by Congress, see Norwegian Nitrogen Co. v. U.S., 288 U.S. 294, 315 (1933). See also Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1125 (1987).

[66] See text accompanying notes 29-46 supra.

found.[67] When it cannot, Chevron now seems to tell the reviewing court to review the agency interpretation only for reasonableness[68] rather than to decide independently, as it might have done in a similar case before Chevron was decided.

2. "Pure Questions" of Interpretation

But at least four justices have put forth a variation on Step 1, concerning interpretations that present "pure question[s] of statutory construction,"[69] which may substantially diminish these effects. It was first advanced in the 1987 Cardoza-Fonseca case[70] by Justice Stevens, who of course was the author of the opinion in Chevron. With the concurrence of four others, he declared for the Court that pure questions "are for the courts to decide."[71] He said that the "narrow legal question" is "quite different from the question of interpretation that arises in each case in which the agency is required to apply [standards from the statutes in question] to a particular set of facts;"[72] as to the latter a court under Chevron must respect the interpretation of the agency. Justice Scalia, concurring in the judgment, sharply disapproved Justice Stevens's language as gratuitously subversive of Chevron.[73]

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[67] Hochberg, 'Two-Step Method of Analysis: Still in Transition After Chevron," Nat'l L.J., May 16, 1988, at 22 n. 13, cites six Supreme Court decisions in which majority and dissent divided over whether Congress has a precise intent, or what it was. Sometimes the courts appear to strain to find congressional intent, to avoid accepting the agency interpretation. See Int's Union, UAW v. FMSHRC, 840 F.2d 77 (D.C. Cir. 1988); Bracamentes v. Weyerhauser Co., 840 F.2d 271 (5 Cir 1988).

Professor Levin suggests that the "precise question at issue" need not be a narrow issue, such as "has Congress talked about the bubble (or whatever the factual situation might be)? No? Then on to Step Two." Instead, "sometimes the precise question framed by the parties can be a fairly broad question, one that requires identifying the broad purposes or the analytical framework that the statute contemplates." Levin et al, Judicial Review of Administrative Action in a Conservative Era, 39 Ad. L. Rev. 353, 377 (1987). Whatever the issue, he proposes that in Step 1 the court should "[extract] all the guidance that it can possibly get out of the statute" before giving up the quest for precise intent and moving to Step 2. Id. at 376.

See Edwards v. McMahon, 834 F.2d 796 (9th Cir. 1987).

[68] 467 U.S. at 842-44, 865-66. See beginning portion of Step 2 discussion, infra.

[69] NLRB v. United Food & Com'l Workers Union, 108 S.Ct. 413 421 (1987); INS v. Cardoza-Fonseca, 107 S.Ct. 1207, 1221 (1987).

[70] INS v. Cardoza-Fonseca, 107 S.Ct. 1207 (1987). In Japan Whaling Ass'n v. American Cetacean Soc., 106 S.Ct. 2860 (1986), Justice White for the Court viewed the issue as "a purely legal question of statutory interpretation," Id. at 2866, which he decided by accepting the agency's interpretation upon finding it reasonable.

The "pure question" idea appeared again in Justice Brennan's opinion for the Court in the 1987 United Food Workers case.[74] He pointedly substituted Cardoza-Fonseca for Chevron in Step 1, stating:

> We review the validity of the relevant regulations, promulgated pursuant to congressional authority, under the standards prescribed in INS v. Cardoza-Fonseca [citation]. On a pure question of statutory construction, our first job is to try to determine congressional intent, using "traditional tools of statutory construction." * * * Id. [citation]. See also Chevron [citation to footnote 9, quoted in note 83 infra]. However, where "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. [citation]. Under this principle, we have traditionally accorded the Board deference with regard to its interpretation of the NLRA as long as its interpretation is rational and consistent with the statute.[75]

The Court found the statutory plan ambiguous as to the specific matter dealt with in the agency's construction, which it held reasonable.[76] Justice Scalia concurred specially, for himself and three others,[77] declaring that the Court's decision demonstrated the unchanged vitality of Chevron in the face of mistaken understandings of dicta in Cardoza-Fonseca:[78] If those dicta had been applied here, he said, the interpretive question at issue surely would have been a pure one, rather than one of applying a statutory standard to particular facts, and the Court could not have upheld the agency's view, as it in fact did, merely by finding it reasonable.

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[71] Id. at 1221.

[72] Id. at 1221-22. The interpretive issue in Chevron was arguably a pure question. See text accompanying notes 29 and 59-60 supra.

[73] Id. at 1224-25.

[74] NLRB v. United Food & Com'l Workers Union, 108 S.Ct. 413 (1987).

[75] Id. at 421.

[76] Id. at 422.

If Chevron at its strongest requires judicial acceptance of reasonable agency interpretations on all issues as to which the statutes are silent or ambiguous, its range of applicability would shrink substantially under a doctrine permitting independent judicial decision of "pure questions." A reviewing court could readily identify even a minor interpretive issue as "pure," on the ground that it was general in nature and not dependent upon the specific facts of any case. Then, even if the court did not find a clear and unambiguous intent, it would not move to a Step 2 consideration of the agency's interpretation, as indicated by Chevron.[79] Instead, it would remain in Step 1 and employ the "traditional tools of statutory construction"[80] to divine congressional intent on the "pure" question.[81] Obviously, since such "pure question" cases would never leave Step 1, the occasions for acceptance of agency interpretations under Step 2 would be fewer.[82]

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[77] Id. at 426. Joining Justice Scalia were Justice O'Connor, who had joined the Stevens opinion in Cardoza-Fonseca, Chief Justice Rehnquist and Justice White. A vacancy on the Court existed at the time of the United Food Workers decision. Thus, the four justices asserting a pure question doctrine are Justices Brennan, Marshall, Blackmun, and Stevens.

[78] Id. Cardoza-Fonseca had been understood in several lower court cases as permitting acceptance of a reasonable agency view only where the question was a mixed one of applying law to fact, or perhaps where the reviewing court could not discern a congressional intent by its own independent interpretative processes, using traditional tools of statutory construction. Union of Concerned Scientists v. NRC, 824 F.2d 108, 113 (D.C. Cir. 1987); Regular Common Carrier Conf. v. U.S., 820 F.2d 1323 (D.C. Cir. 1987); Adams House Health Care v. Heckler, 817 F.2d 587, 593-94 (9th Cir. 1987); International Union, UAW v. Brock, 816 F.2d 761, 764-65 (D.C. Cir. 1987). See also Costello v. Agency for International Development, 843 F.2d 540 (D.C. Cir. 1988).

[79] 467 U.S. at 842-43.

[80] NLRB v. United Food & Com'l Workers Union, 108 S.Ct. 413, 421 (1987), quoting INS v. Cardoza-Fonseca, 107 S.Ct. 1207, 1221 (1987).

Their words asserting independent interpretation for pure questions have been cryptic, and the four justices may not have intended any such large inroad into the strong Chevron principle. Justice Stevens's original mention of a "pure question" in the Cardoza-Fonseca opinion was immediately followed by quotation of a footnote from his Chevron opinion, which declared that a court must give effect to the clear congressional intention, if there is one, on "the precise question at issue."[83] He thus gives the appearance of using the term "pure question" as a synonym for the "precise question at issue." In the passage quoted above from United Food Workers,[84] Justice Brennan may have done the same thing: he substituted "pure question" language in Step 1, and then seemingly referred to it in Step 2 as the "specific issue." If so, the Chevron rules for "precise questions" would govern "pure questions."[85]

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[81] This approach was taken in International Union, UMW v. FMSHRC, 840 F.2d 77 (D.C. Cir. 1988). Citing Cardoza-Fonseca, a different panel of the District of Columbia Circuit has asserted: "When the court faces 'a pure question of statutory construction,' the court need not defer to the agency opinion, even if the statutory provision at issue admits of some ambiguity. [Citations]. In such instances, the court is to use traditional tools of statutory construction to ascertain congressional intent." Union of Concerned Scientists v. NRC, 824 F.2d 108, 113 (1987) (per Mikva, J.) (emphasis added). Judge Stephen Williams in concurrence objected to "unceremoniously dumping our rule of deference to reasonable agency interpretations in areas of statutory ambiguity." Id. at 121. See also Huffman v. Western Nuclear, Inc., 108 S.Ct. 2087, 2092 n.9 (1988).

[82] It has been suggested in dictum that a "pure question case" could move to Step 2 in the limited situation "when a court is unable to discern congressional intent after employing traditional tools of statutory construction." International Union, UAW v. Brock, 816 F.2d 761, 765 n.5 (D.C. Cir. 1987). See also NLRB Union v. FLRA, 834 F.2d 191 (D.C. Cir. 1987).

[83] INS v. Cardoza-Fonseca, 107 S.Ct. 1207, 1221 (1987), quoting the entire text of Chevron footnote 9, as follows: "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. [Citing cases.] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." 467 U.S. at 843 n.9.

[84] At note 75 supra.

If this latter view of the "pure question" inquiry reflects what the justices have intended, though, it is hard to see what the controversy is about, since the new language of "pure question" will have worked no real change. It would not diminish the agencies' ability under Chevron to interpret statutes in ways that the courts must accept.

If the "pure question" notion means anything more expansive than this, it implicates the delegation inquiry that inheres in every agency interpretation case.[86] The four justices seem to have been saying that, to the extent a question is a pure one, the courts will presume that Congress did not assign the primary interpretive authority to the agency. This is consistent with the analysis of pre-Chevron case law, above.[87] On the other hand, the pure question language has been put forward with no apparent regard for the possibility that delegations can occur, even where pure questions are involved.[88] In a given case a reviewing court may find that Congress did give the agency the primary power to resolve the pure question. Recognizing this possibility, at the least, seems necessary to conform to Chevron's mandate that agency interpretations, if reasonable, be accepted whenever an "express" or "implicit" delegation to interpret is found.[89]

Until the subject of "pure questions" is clarified, it cannot be known how much Chevron affects the prior practice. If Chevron appeared to reverse the presumption that no delegation exists in pure question cases, Cardoza-Fonseca and United Food Workers may have restored it.

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[85] See American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987). Judge Starr identified the issue as a "pure question," and approached it through a search for clear intent on that precise question, as called for by the language of Chevron. 467 U.S. at 842-43 and n.9. After extensive review of the statute and its legislative history, he found a "clear Congressional intent" contrary to the position taken in the agency's regulation. 824 F.2d at 1190. Judge Mikva, dissenting, thought the statute ambiguous, such that the court should have accepted the agency's interpretation under Chevron, id. at 1194.

[86] See pages 5-6 supra, and text accompanying notes 149-152 infra.

[87] See notes 29-39 and accompanying text, supra.

[88] See NLRB v. Coca-Cola Bottling Co; 350 U.S. 264, 269 (1956).

[89] 467 U.S. at 843-44; see id. at 865-66.

3. Interpreting for Violation of Statute

In the Dimension Financial case, the Court quoted from the Chevron Step 1 language, and added to it the corollary that the "traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress."[90] This obvious proposition, which would seem to reach any agency interpretation that violates any statute, calls for a more general inquiry than does the Chevron text.[91] Even though it speaks of the situation where the intent of the statute is "clearly expressed," it is not thereby speaking of Congress's *specific* intent on the precise point at issue. An agency interpretation could be struck down under Step 1 even where no such specific congressional focus on the precise issue could be found, so long as the agency action violated a generally stated statute whose clear intent precluded the agency's view. This view can be taken of the statutory intent used to strike down the regulations in Dimension, though it may be arguable that the Court found specific intent on the narrow points at issue. The use of general rather than specific statutory intent to strike down an agency interpretation seems clearer in the 1988 K Mart[92] case. There individual justices, in shifting combinations of concurrences and dissents, voted to invalidate one or more of the regulations involved, although a majority struck down only one of them.[93] The votes to invalidate all appear to be based on the simple proposition that the regulations violated the statute, rather than on the perception that Congress harbored a specific intent which the agency failed to observe.[94]

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[90] Board of Governors, Federal Reserve System v. Dimension Financial Corp., 106 S.Ct. 681, 686 (1986).

[91] *See* United States v. City of Fulton, 106 S.Ct. 1422, 1428 (1986) ("We must uphold that [agency] interpretation if the statute yields up no definitive contrary command and if the agencies' approach is a reasonable one"); Japan Whaling Ass'n v. American Cetacean Soc., 106 S.Ct. 2860, 2868 ("the Secretary is not forbidden [to interpret as he did]"); Chemical Mfrs. Ass'n v. NRDC, 105 S.Ct. 1102, 1108 (1985) ("if Congress has clearly expressed an intent contrary to that of the Agency, our duty is to enforce the will of Congress"); Edwards v. McMahon, 834 F.2d 796 (9th Cir. 1987); Hall v. Lyng, 828 F.2d 428 (8th Cir. 1987); Brock v. Peabody Coal Co., 822 F.2d 1134, 1145 (D.C. Cir. 1987); Barnett v. Weinberger, 818 F.2d 953 (D.C. Cir. 1987); Nevada ex rel. Laux v. Herrington, 777 F.2d 521 (9th Cir. 1985); Mesa Petroleum Co. v. U.S. Dept of Interior, 647 F. Supp. 1350 (W.D. Cal. 1986).

See also Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 468-69 (1987): "Congress rarely addresses precise questions directly * * * . The question is not whether Congress had directly addressed the precise issue, but whether the statute requires or forbids the relevant administrative action."

[92] K Mart v. Cartier, Inc., 108 S.Ct. 1811 (May 31, 1988).

This approach makes it a part of Step 1 to ask whether the agency interpretation affronts any clearly expressed statutory intention, general or specific. It seems eminently sensible to do so. One may cavil that the Court, in the key language of Chevron quoted above, seemed to assign to Step 2 the issue of whether an interpretation pursuant to delegated authority was "manifestly contrary to statute," or "reasonable" (with the matter of statutory compliance to be treated as part of the reasonableness question).[95] But the Court has since acted otherwise. The approach implemented by its actions embodies normal judicial behavior. And it has the merit of simplicity, placing all questions of violation of statute into Step 1.

Under this formulation of Step 1, the agency interpretation must be upheld if it is congruent with a clear congressional intent on the precise issue (or pure question).[96] But if it is contrary to that intent, or contrary to the clear intent of any statute, the court will strike it down without proceeding to Step

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[93] Id. at 1818. Two parts of the regulations were upheld after the Court found "statutory ambiguity" and "imprecision in the statute," so that "the agency is entitled to choose any reasonable definition." Id.

[94] Justice Kennedy, writing for himself and four others, stated: "If the agency regulation is not in conflict with the plain language [intent?] of the statute, a reviewing court must give deference to the agency's interpretation of the statute." Id. at 1817. He then went forward to strike down the one regulation on the ground that it could be supported "under no reasonable construction of the statutory language." 108 S.Ct. at 1818. Justice Scalia, for himself and three others, would also have stricken down two other regulations he determined to be "in conflict" with a statute he found "unambiguous." Id. at 1831.

[95] 467 U.S. at 844. In a nearby footnote, the Court stated: "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." 467 U.S. at 843 n. 9.

[96] E.g., Marchese v. Shearson Hayden Stone, 664 F.Supp. 1381 (C.D. Cal. 1986). This is not an instance of the agency's view binding the court, however, since the governing act of interpretation is that of the court ascertaining the intent of Congress. See Levin, Identifying Questions of Law in Administrative Law, 74 Geo. L.J. 1, 25 (1985).

2. [97] If no statute so mandates or precludes the agency view, the court moves to Step 2.

B. CHEVRON'S "STEP 2"

In Step 2, the court evaluates the agency interpretation, and accepts it if it is reasonable. More precisely, if it finds "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,"[98] the court must accept the agency interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute."[99] This is Step 2A. Alternatively, if it does not find an express delegation but perceives an "implicit" "delegation to [the] agency on [the] particular question," the court must accept a "reasonable interpretation made by the administrator of [the] agency."[100] This is Step 2B.

For both branches of Step 2, the central passage of Chevron, just paraphrased,[101] rather plainly calls for a reviewing court to find an appropriate delegation before the court becomes bound to accept an agency interpretation on the basis of its reasonableness. Accordingly, before assessing reasonableness the court must not only determine in Step 1 that Congress did not have a contrary intent, but it also must affirmatively answer the delegation inquiry at the threshold of Step 2. These two propositions in my opinion correctly state the law, although other language in Chevron indicates a special way of understanding the second one.[102] The matter is central to the analysis of interpretive formats, and will be treated presently, after a brief review of how Step 2 acceptance of agency interpretations works.

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[97] The intent must appear "clearly" to avoid trenching upon the agencies' legitimate power, under Chevron, to interpret ambiguities in statutes entrusted to their administration. See Justice Stevens's use of the term "manifestly contrary to statute" in the second paragraph of the key passage from Chevron quoted above, text at note 61. But see the views of Professor Levin, note 67 supra; Independent Ins. Agents of America v. Board of Governors, Federal Reserve, 838 F.2d 627 (2nd Cir. 1988)

[98] 467 U.S. at 843-44.

[99] Id. at 844.

[100] Id. at 844.

[101] The passage is set forth in full in text at note 61 supra.

[102] See text at notes 134-171 infra.

1. Judicial Acceptance of Reasonable Agency Interpretations

Despite persisting judicial talk of weight and degrees of deference,[103] it is wholly clear that the agency interpretation, if found reasonable, must be accepted by the reviewing court.[104] The "court may not substitute its own construction for a reasonable interpretation" by the agency.[105] Indeed, the mood of deference toward agency views, which permeated the Chevron opinion, has engendered some extravagant formulations[106] and some pointed ripostes.[107] It seems agreed that the agencies' power has been enhanced by the requirement that their reasonable interpretations be accepted by the courts.[108]

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[103] See e.g., Lukhard v. Reed, 107 S.Ct. 1807, 1815 (1987); FDIC v. Philadelphia Gear Corp., 106 S.Ct. 1931, 1938 (1986); Montana v. Clark, 749 F.2d 740, 745 (D.C. Cir. 1984). Even in Chevron itself, Justice Stevens spoke of according "considerable weight" to the agency construction. 467 U.S. at 844.

[104] See FAIC Securities v. United States, 768 F.2d 352, 361 (D.C. Cir. 1985)(Scalia, J.); Starr, Judicial Review in the Post-Chevron Era, 3 Yale J. on Reg. 283, 296 (1986) (in contrast to some pre-Chevron cases, courts "must give controlling weight" to the agency interpretation).

[105] Chevron, 467 U.S. at 844. For an illustration of a court accepting an agency interpretation that it might not prefer but found reasonable, see Council of Commuter Organizations v. Thomas, 799 F.2d. 879, 886 (2nd Cir. 1986).

But where the statute is not within the agency's special competency, its ambiguities are to be resolved by the court. See Dep't of Navy v. FLRA, 840 F.2d 1131 (3rd Cir. 1988) (Freedom of Information and Privacy Acts); Center for Science in the Public Interest v. Regan, 802 F.2d 518 (D.C. Cir. 1986) (Equal Access to Justice Act).

[106] See, e.g., Japan Whaling Ass'n v. American Cetacean Soc., 106 S.Ct. 2860, 2868 (1986) (defer to agency construction "unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress"); Chemical Mfrs. Ass'n v. NRDC, 470 U.S. 116, 126 (1985) ("defer to [agency] view unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress"); Todd v. Norman, 840 F.2d 608, 612 (8th Cir. 1988) (conferral of broad authority upon agency in Social Security matters "insulates his administrative interpretations from a judicial override, unless that interpretation is 'manifestly contrary to the statute.' Chevron * * * "); American Mining Congress v. EPA, 824 F.2d 1177, 1195 (D.C. Cir. 1987)("EPA need demonstrate only that its definition of solid waste does not clearly contradict congressional intent")(dissenting opinion); Humane Society of U.S. v. EPA, 790 F.2d 106, 116 (D.C. Cir. 1986)("we perceive no inconsistency between EPA's interpretation * * * and the legislative history of the Act. We thus are obliged to accept

To be sustained as reasonable, the agency interpretation need not be the only permissible one, and if reasonable it will be upheld even though the court might have construed the statute differently.[109] The agency may change its view, provided the new interpretation is consistent with statute and reasonable,[110] and the change was based on reasoned decisionmaking, adequately explained.[111] Thus, there need be no single true and enduring

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the agency's reading"); NLRB v. Manley Truck Line, 779 F.2d 1327, 1331 (7th Cir. 1985).

[107] See Young v. Community Nutrition Institute, 106 S.Ct. 2360, 2368 (1986)("The task of interpreting a statute requires more than merely inventing an ambiguity and invoking administrative deference")(Stevens, J., dissenting); American Financial Services v. FTC, 767 F.2d 957, 998 (D.C. Cir. 1985)(the "court [was] anesthetized by a misplaced deference to agency authority")(dissenting opinion).

[108] See Sunstein, Constitutionalism After the New Deal, 101 Harv. L. Rev. 421, 465-69 (1987); Mikva, How Should Courts Treat Administrative Agencies?, 36 Am. U.L. Rev. 1, 6-8 (1986); Starr, Judicial Review in the Post-Chevron Era, 3 Yale J. on Reg. 283, 311 (1986); NRDC v. Thomas, 805 F.2d 410, 430 (D.C. Cir. 1986)("The agency's response is also a reasonable interpretation of congressional intent, and in that situation the agency always wins under Chevron")(Wald, J.).

[109] Chemical Mfrs. Ass'n v. Natural Resources Defense Council, 470 U.S. 116, 125-26 (1985). See Orloski v. FEC, 795 F.2d 156, 167 (D.C. Cir. 1986).

[110] "The fact that the agency has from time to time changed its interpretation of the term "source" does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rule making, must consider varying interpretations and the wisdom of its policy on a continuing basis." Chevron, 467 U.S. at 863-64.

[111] See id. at 863; Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43, 57 (1983); Mobil Oil Corp. v. EPA, 871 F.2d 149, 152 (D.C. Cir. 1989); Continental Air Lines v. Dep't of Transportation, 843 F.2d 1444, 1452 (D.C. Cir. 1988); Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408, 412 (7th Cir. 1987); Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for

interpretation.[112] Where Congress has not definitively spoken, agency interpretation is largely a matter of discretionary policymaking, the "wisdom" of which is of no concern to a reviewing court.[113] Indeed, it has been suggested that in such circumstances (that is, where the court has moved to Step 2), the scope of review for statutory interpretations should be assimilated to that for policy judgments made independently of specific statutory language or made under empty standards such as "the public interest."[114]

Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1129-35 (1987).

[112] "An ambiguous legal rule does not have a single 'right' meaning: there is a range of possible meanings; the selection from the range is *an act of policymaking*. The person who fleshes out the meaning of the rule is the true law-giver in the circumstances." Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408, 411 (7th Cir. 1987)(per Easterbrook, J.). *See also* note 170 *infra*.

[113] "When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail." *Chevron*, 467 U.S. at 866. *See* Investment Co. Institute v. FDIC, 815 F.2d 1540, 1549 (D.C. Cir. 1987). There may be an uncertain line between contentions that go to wisdom and those that go to reasonableness, in light of the way the latter is to be tested. *See* notes 115-127 and accompanying text, *infra*.

[114] Pierce, Chevron *and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 Vand. L. Rev. 301 (1988). *But see* Continental Air Lines v. Dep't of Transportation, 843 F.2d 1444, 1452 (D.C. Cir. 1988); Breyer, *Judicial Review of Questions of Law and Policy*, 38 Ad. L. Rev. 363 (1986), in which Judge Breyer distinguishes interpretations, which involve questions of law, from policy determinations, which do not, and recognizes (but does not advocate) distinct standards for the judicial review of each category. *See also* Levin, *Identifying Questions of Law in Administrative Law*, 74 Geo. L.J. 1, 12, 25 (1985).

Justice Stevens's *Chevron* formulation, 467 U.S. at 844, of the test in Step 2A, for legislative regulations that interpret statutes, uses the words "arbitrary" and "capricious" which are part of the APA standard, 5 U.S.C. § 706 (2)(A), that is used to review policy determinations, *see* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983); perhaps these tests can therefore be regarded as identical so far as they are not concerned with violation of statute. (For the

How is the "reasonableness" of the agency interpretation to be evaluated?[115] Justice White has said: "Our review is limited to the question whether it is reasonable, in light of the language, policies and legislative history of the Act * * * .[116] Judge Starr has stated that "reasonableness in this context is to be determined by reference both to the agency's textual analysis (broadly defined, including where appropriate resort to legislative history) and to the compatibility of that inquiry with the Congressional purposes informing the measure."[117] The latter branch of this inquiry does not warrant a judicial search for the interpretation that "best promotes" the legislative purpose;[118] rather, the court should decide whether the agency reasonably explained how the interpretation serves the statutory objectives and whether the interpretation frustrates congressional policy.[119]

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content of such standard, see id. at 41-45; Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414 (1971)). But for Step 2B, involving interpretations pursuant to implicit delegations, Justice Stevens specified simply that the interpretation must be "reasonable", which may establish a standard theoretically different from those of Step 2A and APA § 706(2)(A). See notes 128-131 and accompanying text, infra.

For a decision applying Chevron Step 2A to the ICC's interpretation of the broad term "reasonable," see Drug & Toilet Preparation Traffic Conf. v. U.S., 797 F.2d 1054, 1057-58 (D.C. Cir. (1986).

[115] As remarked, courts and commentators almost universally merge Steps 2A and 2B into a single "reasonableness" inquiry. See, e.g., authorities cited at note 62 supra.

[116] United States v. Riverside Bayview Homes, Inc., 106 S.Ct. 455, 461 (1985).

[117] Continental Air Lines v. Dep't of Transportation, 843 F.2d 1444, 1449 (D.C. Cir. 1988). By the language "in this context" Judge Starr may be contrasting the instant case with the Step 2A "paradigm" of expressly-delegated legislative rules; if so, the quoted passage refers only to Step 2B.

[118] Id. at 1451.

[119] Id. at 1452-53 (citing Chevron, 467 U.S. at 863, and FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981)). Judge Starr suggests that this inquiry is different from and less exacting than that under the arbitrary-and-capricious analysis articulated in Overton Park and State Farm, note 113 supra.

See, e.g., Cablevision Co. v. Motion Picture Ass'n, 641 F.Supp. 1154 (D.D.C. 1986)(agency interpretation unreasonable as contrary to statutory purposes); Oliver v. Ledbetter, 624 F.Supp.

In their Step 2 assessments, courts often identify factors or considerations that enlarge or diminish their perceptions of agency reasonableness.[120] Excellently summarized in the recent literature,[121] those that enhance reasonableness include the importance of agency expertise in a technical or complex area, detailed and reasonable consideration by the agency, the need to reconcile conflicting policies,[122] congressional grant to the agency of explicit rulemaking authority, interpretation contemporaneous with the agency's setting the statutory machinery into motion, congressional awareness of the agency view and rejection of changes, and the consistency with which the agency interpretation has been applied.[123] Considerations militating

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325 (N.D. Ga. 1985)(agency interpretation reasonable as consistent with statutory purposes).

The attention so given to statutory objectives in Step 2 contrasts interestingly with the process in Step 1. There, even when the reviewing court cannot find specific congressional intent, it may not form its own interpretation derived from perceived statutory purposes, as it might properly do if no agency interpretation were in the picture. Chevron, 467 U.S. at 843. See note 65 supra.

[120] As noted, some of these factors can bear upon inquiries as to whether a delegation to interpret exists or whether an agency position is correct. See notes 51-52 and accompanying text, supra.

[121] See Hochberg, Two-Step Method of Analysis: Still in Transition After Chevron, Nat'l L.J., May 16, 1988 at 22, 26 text at notes 26-33; Note, Coring the Seedless Grape: A Reinterpretation of Chevron U.S.A. Inc. v. NRDC, 87 Colum. L. Rev. 986, 997-1002 (1987); Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, 562 n. 95 (1985). Woodward and Levin, In Defense of Deference: Judicial Review of Agency Action, 81 Ad. L. Rev. 329, 332-36 (1979).

[122] The three factors just listed were cited by the Chevron opinion, 467 U.S. at 865.

[123] See Massachusetts v. U.S. Dep't of Education, 837 F.2d 536, 543 (1st Cir. 1988)(expertise); Barnett v. Weinberger, 818 F.2d 953, 962-63 (D.C. Cir. 1987)(detailed consideration); Production Workers Union v. NLRB, 793 F.2d 323 (D.C. Cir. 1986)(conflicting policies); Massachusetts v. Secretary of HHS, 749 F.2d 89, 96 (1st Cir. 1984)(explicit rulemaking authority); NLRB v. United Food & Com'l Workers Union, 108 S.Ct. 413, 421 n. 20 (1987)(contemporaneous interpretation); United States v. Riverside Bayview Homes, Inc., 106 S.Ct. 455, 463-65 (1985)(congressional awareness); NLRB v. United Food & Com'l Workers Union, 108 S.Ct. 413, 421 n. 20(consistency of

against the reasonableness of an agency interpretation include concern that it may raise constitutional questions,[124] flawed agency reasoning and inadequate explanation,[125] inconsistency of agency positions,[126] and agency self-aggrandizement.[127]

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interpretations); Bowen v. American Hospital Ass'n., 106 S.Ct. 2101, 2122 n. 34 (1986)(same). *But see* notes 109-110 and accompanying text, *supra*.

[124] *See* DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const., 104 S.Ct. 1392 (1988); Note, *Coring the Seedless Grape: A Reinterpretation of* Chevron U.S.A. Inc. v. NRDC, 87 Colum. L. Rev. 986, 1002-3 (1987).

[125] *E.g.*, Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408 (7th Cir. 1987); Brock on behalf of Williams v. Peabody Coal Co., 822 F.2d 1134 (D.C. Cir. 1987); Brock v. Louvers and Dampers, Inc. 817 F.2d 1255 (6th Cir. 1987); Phillips Petroleum Co. v. FERC, 792 F.2d 1165 (D.C. Cir. 1986).

[126] INS v. Cardoza-Fonseca, 107 S.Ct. 1207, 1221 n. 30 (1987). *But see* notes 110, 112, *supra*. "The very meaning of the second stage, emphasized in *Chevron*, is that within the zone of indeterminacy, an agency is free to change its view -- and the obligation of the courts to accept the changed view is not altered by the fact of the change." Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093, 1125 (1987). *See* Hicks v. Cantrell, 803 F.2d 789, 793 (4th Cir. 1986).

[127] *See* Mikva, *A Reply to Judge Starr's Observations*, 1987 Duke L.J. 380, 383; Sunstein, *Constitutionalism after the New Deal*, 101 Harv. L. Rev. 421, 468 (1987); Note, *supra* note 121 at 1005-7; Larinoff v. United States, 533 F.2d 1167, 1178 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977). Analytically, however, it can be asserted that the scope of an agency's authority is implicated every time it interprets its own statute. *See* Addison v. Holly Hill Fruit Products, Inc. 322 U.S. 607 (1944). Presumably a line might be drawn somewhere between, for example, assertion of power over new subject matter (*see* Winter, *The Quiche Brief*, Regulation, Sept.-Oct. 1986, at 31) or "the unauthorized assumption by an agency of major policy decisions properly made by Congress," (Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 97 (1983), *quoting* American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965)) and, on the other hand, the expert filling of interstices in the everyday administration of the statute (*see* St. Luke's Hospital v. Secretary of HHS, 810 F.2d 325, 331 (1st Cir. 1987)(per Breyer, J.).

The Chevron opinion separately stated the standards of judicial scrutiny for Steps 2A and 2B respectively,[128] and a few courts have discerned an operational difference, or the possibility of one.[129] It is quite thinkable that interpretations set forth in expressly authorized legislative regulations should trigger less scrutiny than those set forth in other ways.[130] And it is at least imaginable that Chevron's differentiated formulations can be given differentiated practical applications.[131]

Whatever may be the significance of these distinctions, though, there is another far more important reason to keep Steps 2A and 2B distinct. That is to assure that reviewing courts, especially in Step 2B cases, consciously ask whether there is a delegation authorizing the agency's interpretation. All Step 2A cases involve legislative regulations authorized by "express delegation,"[132] and that delegation is usually so easy to find that it will pose no issue for the court to ponder. By contrast, the delegation issue is a vital one for other kinds of agency interpretations, reviewed by means of Step 2B, in which the court must actively seek an "implicit" delegation. But in their practice of merging Steps 2A and 2B into a single reasonableness inquiry, many courts apparently follow the simpler Step 2A and consequently forget about the delegation issue entirely, even in Step 2B cases where it should be indispensable.

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[128] See quoted text at notes 61, 98-100, and note 113, supra.

[129] See Rettig v. Pension Benefit Guar. Corp., 744 F.2d 133, 151 (D.C. Cir. 1984)("language in Chevron might be read to indicate that the appropriate standard of review in such a situation varies to some degree dependent on whether the statute's delegation of gap filling authority is explicit or implicit")(per Wald, C.J.); Del. Div. of Health and Soc. Serv. v. Dep't of HHS, 665 F.Supp. 1104, 1120 (D.Del. 1987)(Step 2B standard is "less deferential than the arbitrary and capricious standard"); Panzarino v. Heckler, 624 F.Supp. 350 (S.D.N.Y. 1985)(where rulemaking authority "is only implicit, the scope of our review is somewhat more searching than the 'arbitrary, capricious or manifestly contrary to statute' standard); Hochberg, 'Two-Step' Method of Analysis: Still in Transition After Chevron, Nat'l L.J., May 16, 1988 at 27 n.34. See also note 119 supra. But see authorities cited at note 60 supra.

[130] See text at note 17 supra and notes 204-212 infra.

[131] But Justice Frankfurter warned of "the intractability of any formula to furnish definiteness of content for all the impalpable factors involved in judicial review." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951).

[132] Chevron, 467 U.S. at 843-44.

2. The Place of the Delegation Inquiry in Step 2

In review of agency interpretations, the sequence of inquiry is (1) substantive statutory questions (Step 1),[133] (2) the question of delegation of authority for the interpretation (threshold of Step 2), and, if there is a sufficient delegation, (3) the question of reasonableness (Step 2).

An affirmative finding of specific substantive intent will usually decide the case and in any event will clearly preclude any delegation to the agency to interpret as it has done. A finding that the agency's interpretation violates a statute will do the same. If the answer to both of these questions is negative -- that is, if statutes do not supply substantive norms by which the agency interpretation can be dispositively judged -- the reviewing court moves to Step 2. It should not, however, plunge directly into evaluating the agency interpretation for reasonableness. The prior and vital inquiry at this point is whether Congress has delegated to the agency authority for its interpretation. The Step 2 inquiry is framed thus: First, is issuance of the interpretation within a delegation of primary authority to interpret in this fashion? Then, is the interpretation reasonable? If the answer to either question is negative, the court is not bound to accept the agency's interpretation.

To bind a court to accept an agency's reasonable construction, there must certainly be a delegation;[134] what is not certain is whether such a delegation, where not made expressly, will be presumed to have been made implicitly. This may be the most vexing of the many uncertainties left by Chevron.[135] Obviously, this question cannot arise in Step 2A, where only express delegations are involved. But for Step 2B cases, as to which the Chevron text calls for an "implicit" delegation, certain passages in Chevron and elsewhere suggest that a sufficient delegation must be presumed to exist whenever there is a "gap" in the statute -- that is, whenever the statute is silent or ambiguous on the specific issue, such that the matter cannot be resolved by judicial interpretation in Step 1.

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[133] See text at note 96-97 supra.

[134] See text at notes 98-102 supra.

"[D]eference to an agency's interpretation constitutes a judicial determination that Congress has delegated the norm-elaboration function to the agency and that the interpretation falls within the scope of that delegation." Montana v. Clark, 749 F.2d 740, 743 (D.C. Cir. 1984), citing Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1, 25-28 (1983).

[135] See Anthony, Which Agency Interpretations Should Get Judicial Deference? -- A Preliminary Inquiry, 40 Ad. L. Rev. 121, 126-27, 130-31 (1988).

The formulary paragraphs of Chevron[136] offer no guidance about how the requisite implicit delegation is to be detected.[137] But in provocative language near the close of his opinion, Justice Stevens declared that "it matters not" whether Congress consciously wished the agency to interpret or simply did not consider the specific question.[138] This suggests that, by its very silence or ambiguity, Congress implicitly delegates adequate interpretive authority on the issue. Justice Stevens reinforced this suggestion by speaking approvingly in the next paragraph of an agency "resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency * * * ," although he was there referring to "an agency to which Congress had delegated policymaking responsibilities * * * , [acting] within the limits of that delegation."[139]

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[136] Set forth in text at note 61 supra.

[137] The quotation from Morton v. Ruiz, set forth in text at note 61 supra, may misleadingly color judicial understanding of the later words about implicit delegation. Morton was not concerned with delegation of interpretive authority in the absence of rulemaking authority. Rather, the Court stressed the agency's obligation to formulate gap-filling policy rules where required to establish eligibility among needy Indians in the face of an inadequate appropriation. Although the quotation in Chevron seems to be taken that way, Morton does not in any fashion support the notion that a "gap" creates or delegates any rulemaking or other interpretive power that did not already exist. To the contrary, it disapproved failure to use existing rulemaking powers sufficiently to meet program needs. See text at notes 154-161 infra. On the significance of Morton v. Ruiz, see Fuchs, Development and Diversification in Administrative Rulemaking, 72 Nw. U.L. Rev. 83, 101-102 (1977).

[138]
> "Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by [this case]. Perhaps that body consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred."

Chevron, 467 U.S. at 865.

The idea that a "gap" in congressional intention or statutory language ipso facto delegates all needed interpretive authority, or something like it, has several times won eminent expression.[140] In effect these formulations conclusively presume a delegation from the statutory silence or ambiguity; they omit any search for evidence or inference about Congress's delegatory intentions.

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> "Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."

Chevron, 467 U.S. at 865-66.

[140] *See* National Wildlife Federation v. Hodel, 839 F.2d 694, 741 (D.C. Cir. 1988)(clear evidence of congressional intent to preclude agency's interpretation is "a necessary prerequisite here to rebut the inference that Congress meant to delegate to the Secretary the authority to interpret the general and ambiguous terms")(per Wald, C.J.); National Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563, 1569 (D.C. Cir. 1988)("When Congress leaves gaps * * * implicitly by enacting an ambiguously worded provision that the agency must interpret, it has * * * implicitly delegated to the agency the power to fill those gaps. That delegation requires the courts to defer to an agency's decision")(per Bork, J.); Drummond Coal co. v. Hodel, 796 F.2d 503, 507 (D.C. Cir. 1986)("Since Congress did not explicitly address the proper meaning of the words * * * Congress has left a gap in the regulatory regime for the agency to fill. * * * We have no warrant to set aside the agency's interpretation, if reasonable")(per Silberman, J.); Investment Company Institute v. Conover, 790 F.2d 925, 935 (D.C. Cir. 1986)("*Chevron* teaches that Congress may delegate interpretative authority implicitly -- by failing to legislate in sufficient detail as to resolve or particular question of interpretation")(per Starr, J.). *See also* Lukhard v. Reed, 107 S.Ct. 1807, 1813 n. 3 (1987)(Scalia, J.); Delaware Div. of Health & Soc. Serv. v. U.S. Dep't of HHS, 665 F.Supp. 1104, 1119 (D.Del. 1987).

One may hesitate to accept this proposition, and its suggestion that delegation has no significant role in Chevron analysis. The omission of a delegation inquiry would contradict express language[141] and an apparent premise of Chevron: that agency interpretations will bind the courts when Congress wants them to. Unless the courts will at least inquire into the delegatory wishes of Congress in particular cases, they risk thwarting those wishes. A capital judicial responsibility here is to determine what authority has been conferred upon the agency;[142] to forswear the delegation inquiry is to abdicate this pivotal task, which makes up the bulk of the Marbury duty to say what the law is in these cases.[143] Moreover, to do so would undercut the benefit of national uniformity justly claimed for agency interpretations:[144] if those interpretations are rightfully to displace the powers of the myriad of courts nationwide to say what the law is, they should possess the warrant for doing so that only congressional delegation of appropriate powers can confer.

But these objections mainly beset only one of the two kinds of delegation that must exist if the agency's interpretation is to bind the courts. The Stevens language, like that of the judges just cited,[145] refers to delegation (the first kind) to interpret authoritatively with respect to the subject matter of the statutory gap. The doctrine that a gap automatically creates such a delegation is not ordinarily open to the objections that have just been canvassed, provided the agency's interpretation is adequately covered by a delegation (the second kind) to pronounce authoritative interpretations in the format chosen by the agency. The objections reviewed above go to this second kind of delegation, and demonstrate the infirmity of any notion that a gap can automatically provide the requisite delegation as to format.

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[141] Set forth in the middle paragraph of the quotation in text at note 61 supra; discussed in text at notes 98-100 supra.

[142] See Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1, 27 (1983), citing Addison v. Holly Hill Fruit Prods., Inc. 322 U.S. 607, 616 (1944).

[143] Since the courts retain the capacity independently to adjudge specific statutory intent in Step 1 and reasonableness in Step 2, the abdication of this task probably would not an be unconstitutional abridgement of the court's independence.

[144] See Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1121-24, 1129-33 (1987).

[145] See note 140 supra.

As to the first kind: Except possibly where they confront "pure questions," and unless a contrary congressional intent appears, reviewing courts properly treat the existence of a gap as a sufficient delegation of the power to establish interpretations carrying the force of law on subject matter lying within that gap. When acting within the gap, the agency is realistically viewed as making policy, rather than interpreting for a single best meaning, as a court might do.[146] For reasons that are well stated elsewhere,[147] it is both sound and sensible to look to the agency that exercises related policymaking responsibilities,[148] and not to the court system, as the competent organ to fill the substantive interstices.

So far as authority over the subject matter is concerned, then, the gap can satisfy the requirement, identified above,[149] that a sufficient delegation be found at the threshold of Step 2. But to grant this proposition is not to abandon that threshold requirement, for two reasons. The more important consideration is the need to find a delegation as to the format, which has been alluded to above and will be discussed presently. Even keeping within the realm of subject-matter powers, though, there is reason to retain the delegation inquiry as an essential part of the analytical structure. So long as the Supreme Court holds open the possibility that "pure questions of statutory construction" will be treated differently from other interpretive issues,[150] the reviewing courts must pursue a delegation analysis: did Congress intend the agency's resolution of the "pure question" at issue to bind the courts?

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[146] *See* Pierce, Chevron *and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 Vand. L. Rev. 301 (1988). "An ambiguous legal rule does not have a single "right" meaning; there is a range of possible meanings; the selection from the range is an act of policymaking. The person who fleshes out the meaning of the rule is the true law-giver in the circumstances." Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408, 411 (7th Cir. 1987) (per Easterbrook, J.).

[147] Pierce, *supra* note 146; Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093, 1117-26, 1129-33 (1987).

[148] There is no delegation to an agency that lacks policymaking powers. *See* Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268, 278 n.18 (1980) (Stevens, J.); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2nd Cir. 1976).

[149] *See* text following note 133, *supra*.

There probably should be no single rule for all "pure question" cases regardless of the statutes and formats involved. Again, the question should be one of legislative intent, addressed in terms of relevant evidence and inferences of intent. Even if most pure questions were subjected to independent judicial review, Congress in some statutes may nevertheless have endowed particular agencies with interpretive powers meant to be subjected only to limited review.[151] And it can well be imagined that the courts, while exercising independent review when the agency resolves the pure question by adjudication, might nonetheless impose only limited review when the question is resolved in legislative regulations, as to which the delegatory intent might appear stronger.[152]

3. The Key Inquiry: Is the Interpretation in This Form Binding?

The delegation implied from a statutory gap authorizes binding interpretive action with respect to the subject matter, as just described, but not with respect to the format in which the interpretation is set forth. Even when possessed of the subject matter delegation created by such a gap, the agency cannot express its interpretation in any format it pleases and expect to command the courts' acceptance. To act with such binding effect, it must enjoy a separate delegation of power to pronounce interpretations with the force of law in the format it uses.

To hold otherwise would sacrifice any chance to assure that the interpretation is one that Congress deems worthy of binding effect in the courts. If an agency head has filled a gap with an opinion expressed in a letter or in a speech or in an amendment to the manuals, for example, should not the reviewing court at least ask whether Congress wants it to be bound by that kind of pronouncement? If such informal gap-fillers must always be presumed binding, subject only to reasonableness review, they would have as much force as legislative regulations do. An agency would then have little need for regulations, or for the statutory delegations and public procedures that safeguard them.[153]

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[150] See text accompanying notes 69-89, supra.

[151] See text at notes 88-89, supra. See also the concurring opinion of Justice Scalia in the United Food case, paraphrased in text at notes 77-78 supra, arguing that the Court there gave only limited "reasonableness" review to the NLRB's determination of a pure question.

[152] Compare INS v. Cardoza-Fonseca, 107 S.Ct. 1207 (1987)(pure question resolved in adjudicatory decision) with Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984)(pure question resolved in legislative regulations).

Morton v. Ruiz,[154] whose widely-noted "gap filling" passage[155] was quoted in Chevron's key paragraph,[156] is illustrative. Plaintiffs, who had left their Indian reservation to live in an Indian community nearby, were denied general assistance benefits because of a provision in the Bureau of Indian Affairs Manual limiting eligibility to Indians living "on reservations." In the light of appropriations provisions and other legislative history, the Court construed the statutory words "on reservations" to mean "on or near reservations."[157] But, in view of the insufficiency of appropriated funds to cover all of those near as well as on reservations, the Court declared that it was incumbent upon the agency to develop an eligibility standard which, if rational and proper, might leave some of the class without benefits.[158] In an analysis parallel to a Chevron Step 2 determination of reasonableness, the Court assumed arguendo that the agency could rationally limit eligibility to those living directly on the reservations. But it held that this had not been validly accomplished by the Manual. Expressly noting that the agency had "long been empowered to promulgate rules and policies,"[159] the Court held that "the determination of eligibility cannot be made on an ad hoc basis,"[160] and that the longstanding provisions of the Manual did not cure the failure to establish the standard by a legislative rule published in the Federal Register:

> The only official manifestation of this alleged policy of restricting general assistance to those directly on the reservations is the material in the Manual which is, by BIA's own admission, solely an internal-operations brochure intended to cover policies that "do not relate to the public." Indeed, at oral argument the Government conceded that for this to be a "real

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[153] See 5 U.S.C. § 553; General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976); 2 K.C. Davis, Administrative Law Treatise 54-60 (2d ed. 1979).

[154] 415 U.S. 199 (1974).

[155] Id. at 231.

[156] Set forth in text at note 61 supra.

[157] 415 U.S. at 230.

[158] Id. at 230-31.

[159] Id. at 231.

[160] Id. at 232.

> legislative rule," itself endowed with the force of law, it should be published in the Federal Register.[161]

We may note that the agency did interpret the statute to fill the subject-matter gap, in a way the Court was willing to assume was substantively reasonable. But the format it chose was insufficient. Although it possessed delegated rulemaking authority, the agency chose to establish its standard only in the Manual, through which it had no delegated power to speak with the force of law.

Similarly in Chevron, once the court determined that the issue about the bubble lay within a gap in congressional intent,[162] the controlling question became one of whether such an interpretation issued as a legislative regulation should be binding. The Court of course answered affirmatively. Congress did not have substantive intent about the bubble as such, but it had an interpretive intent about the force to be given EPA's gap-filling interpretations set forth in legislative regulations.

The delegation as to format must be tested, as always, by assessing interpretive intent: Did Congress intend that interpretations issued in this format are to be binding?[163] The answer often will be quite readily found.[164] In other situations, Congress's interpretive intent respecting the agency's format will have to be derived by inference or construction. Again, in many instances, this should not be difficult.[165] Consider the adjudications in which the NLRB applies the National Labor Relations Act to specific labor-management situations. Can there be any doubt that Congress expects the resulting interpretations, if reasonable and consistent with the Act, to bind the courts? That conclusion can be confidently drawn from inferences about Congress having in mind such things as the large numbers of these cases, the relative level of detail involved, the potential waste of requiring reinterpretation by the courts,[166] and the lodgement of direct review in the courts of appeals rather than the district courts -- not to mention the antiquity of the Hearst case so holding.[167]

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[161] Id. at 234-35.

[162] Professor Strauss usefully refers to such issues as falling within a "zone of indeterminacy." Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1125 (1987).

[163] To repeat, the usage of the terms "bind" and "binding" here includes the understanding that the interpretation is subject only to limited review, for reasonableness and consistency with statute.

[164] It will be self-evident, for example, whenever legislative rules pursuant to an "express delegation", see Chevron, 467 U.S. at 843, are involved. And for certain formats there may occasionally exist express statutory language enabling a court to conclude that Congress specifically intended agency interpretations so issued to be binding. A vivid example is Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 556-68 (1980) (statutory provision of a defense for reliance upon agency and staff interpretations "signals an unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative").

By contrast, consider an NLRB interpretation set forth only in a press release, or in testimony presented to a congressional committee. The delegation inquiry is particularly critical in such a case. Can it be thought that Congress would wish interpretations so expressed to bind the courts? One would have to canvass the specific circumstances of the National Labor Relations Act and its amendments, but its very doubtful that an intent to delegate authority to interpret in that format would be found. And it seems doubtful that such an intent would be inferred or presumed, since the format is not one ordinarily used for pronouncements intended to carry the force of law.

How does the "force of law" of a format affect decision of the delegation inquiry? It would be circular to say that the needed delegation can be found whenever the format carries the force of law, since force of law is simply the result of the delegation. An interpretation will have the force of law when the agency has exercised delegated power, as to both subject matter and format, reflecting congressional intent that such an interpretation is to bind. "Force of law" as used here merely connotes the binding effect given the kinds of agency interpretations that Congress through its delegations intends to bind the courts.[168] And that binding effect (force of law) means simply that the courts may not subject the interpretations to independent judicial review, but rather must accept them subject only to limited review for reasonableness and consistency with statute.[169] Thus, an interpretation carrying the force of law gets only limited review because by definition it is covered by delegation that contemplates only limited review.

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[165] "[I]f Congress is silent, courts may still infer from the particular statutory circumstances an implicit congressional instruction about the degree of respect or deference they owe the agency on a question of law. See Chevron * * *. They might do so by asking what a sensible legislator would have expected given the statutory circumstances." Maybury v. Sec'y of HHS, 740 F.2d 100, 106 (1st Cir. 1984) (per Breyer J.)

"Factors" bearing upon delegation of interpretive authority can be relevant. See note 52, supra and the Note there cited.

[166] See United States v. Louisville & Nashville R., 235 U.S. 314, 320-21 (1914).

[167] See notes 23-25 and accompanying text, supra; NLRB v. Erie Resistor Corp., 373 U.S. 221, 236-37 (1963).

Chevron's own language suggests that "implicit" delegation should be inferred only for formats that usually carry the force of law. For Step 2A, the express delegation it spoke of conferred power "to elucidate a specific provision of the statute by regulation"[170] -- that is, to act with the force of law. By direct analogy, a similarly potent delegation should be required in Step 2B: That is, the reviewing court should not be bound unless it can find that the implicitly delegated power authorizes issuance of interpretations possessing the force of law in the format used.[171]

Concededly, in practice the delegation inquiry will be easily and affirmatively answered in the large majority of cases.[172] But though this inquiry may become a routine one, the reviewing court should not accept an agency interpretation under Step 2B unless it can affirmatively find an appropriate delegation. When the delegation question is answered negatively -- as for example where the format expressing the agency interpretation is too informal -- the court should not go forward to the reasonableness stage of Step 2.

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[168] See 2 K.C. Davis, Administrative Law Treatise 53-54 (2d ed. 1979). Force of law, of course, also connotes binding effect upon the public and upon the agency itself.

[169] See Joseph v. U.S. Civil Service Comm'n, 554 F.2d 1140, 1154 n. 26 (D.C. Cir. 1977).

[170] 467 U.S. at 843-44.

[171] Both cases in Chevron's supporting footnote, 467 U.S. at 844 n. 13, involved dispositive adjudicative actions within clear authority so to act, INS v. Jong Ha Wang, 450 U.S. 139, 144 (1981) (Board of Immigration Appeals's denial of motion to reopen deportation proceeding on basis of its interpretation of statutory "extreme hardship" standard); Train v. National Resources Defense Council, 421 U.S. 60, 87 (1975) (EPA's approval of state implementation plan on basis of its interpretation of provision concerning "revision" of such plans).

[172] The finality, exhaustion and ripeness rules, see R. Pierce, S. Shapiro & P. Verkuil, Administrative Law and Process 180-206 (1985), will block judicial review of many agency interpretations expressed in formats of less dignity than completed adjudications or regulations.

As a matter of practical judicial psychology, it may often make little operational difference whether an interpretation is reviewed independently but given Skidmore consideration or is reviewed for reasonableness under Chevron Step 2. But the conceptual difference is large. An interpretation subject to the limited review of Chevron's Step 2 binds the court -- and therefore is law -- unless it can be found unreasonable. The agency thus makes law. But "no agency has the power to legislate unless Congress has delegated legislative power to it."[173] A delegation, express or implied, must be the foundation for any interpretation that can bind the courts in this fashion. "The principle is nothing less than the principle that distinguishes democratic government from dictatorship."[174]

4. A Suitable Standard for Review

How, then, should the reviewing court act upon a case in which it has concluded (in Step 1) that the agency interpretation is not contrary to statute but (at the threshold of Step 2) that because of inadequate delegation it does not possess the force of law?

As a general rule, the court should undertake an independent review of the statute, extending to the agency's view such special consideration as it finds helpful.[175] This approach should be observed in all cases where the nature of the litigation obliges the court to arrive at a definitive interpretation in order to resolve the case. Thus, reviewing courts should refrain from extending Chevron acceptance to informal agency interpretations in settings such as judicial enforcement proceedings,[176] private litigation,[177] review of agency actions that rest upon interpretations not having the force of law,[178] review of the actions of agencies that exercise no policymaking powers and are therefore unequipped to interpret with the force of law,[179] and challenges to state actions that implicate federal agency interpretations of federal statutes.[180] Since the agency's views cannot bind it in such cases, the court must arrive at its interpretation independently, subject only to Skidmore consideration.[181]

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[173] 2 K.C. Davis, Administrative Law Treatise 54 (2d ed. 1979). "The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to the limitations which that body imposes." Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979).

[174] 2 K.C. Davis, supra note 173, at 55.

[175] See text at notes 47-52 supra. This approach is well illustrated by Malloy v. Eichler, 628 F.Supp. 582, 592-98 (D.Del. 1986), affirmed 860 F.2d 1179 (3rd Cir. 1988).

[176] Examples of this pattern are Bond v. U.S., 872 F.2d 898, 901 (9th Cir. 1989); D & W Food Centers v. Block, 786 F.2d 751, 757 (6th Cir. 1986).

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[177] Examples of this pattern are Mead Corp. v. Tilley, 109 S.Ct. 2156, 2161-64 (1989); Patel v. Quality Inn South, 846 F.2d 700, 703 (11th Cir. 1988); Dove v. Coupe, 759 F.2d 167 (D.C. Cir. 1985).

[178] Examples of this pattern are Conley v. Brewer, 652 F.Supp. 106 (W.D.Wis. 1986); White v. Bowen, 636 F.Supp. 1235, 1239-41 (S.D.N.Y. 1986).

[179] Examples of this pattern are Sanders v. Alabama Dry Dock & Shipbuilding Co., 841 F.2d 1085, 1087 (5th Cir. 1988); William Bros., Inc. v. Pate, 833 F.2d 261, 264-65 (11th Cir. 1987).

[180] Examples of this pattern are Hicks v. Cantrell, 803 F.2d 789, 791 (4th Cir. 1986); Leigl v. Webb, 802 F.2d 623, 625-27 (2nd Cir. 1986) (rejecting interpretation set forth in manual but accepting interpretation set forth in notice of proposed rulemaking); Reed v. Blizinger, 639 F.Supp. 130, 132 (S.D.Ind. 1986)

[181] After Chevron, may a reviewing court adopt the posture that, as a matter of judicial comity toward the executive, it will accept any reasonable agency interpretation even if informally expressed? Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980), is the salient pre-Chevron case in which the court accepted an informally-expressed agency interpretation. I understand Justice Brennan's opinion there to hold that Congress had expressly delegated to the Federal Reserve staff the authority to issue binding interpretations, which the courts therefore must accept if reasonable. See 444 U.S. at 566-68, and notes 9 and 164 supra. But the Court might also be understood as having chosen in the circumstances to accord comity to the expert agency, by accepting its interpretations even where they were informally expressed. On this view, a delegation would not be essential where the court chose to accept the informal interpretation rather than to interpret independently. If this is a sound understanding of at least an alternative holding in Milhollin, it arguably survives Chevron, which, despite its insistence on delegation before the court must accept the agency view, see text of Chevron quoted at note 61 supra and text at notes 98-100 and 132-161 supra, said nothing expressly to

An exception to this rule should apply where an agency, though possessing authority to interpret with the force of law, has to date expressed its interpretation only informally.[182] If that informal interpretation becomes the subject of direct review before the agency has taken concrete action based upon it, a different judicial response is appropriate. The fact that the informal interpretation has no binding force should not entitle the court by independent interpretation to tell the agency what definitive view to adopt. The agency should remain untrammeled in its freedom to choose a position anywhere within the zone of indeterminacy.[183]
The reviewing court therefore should decide only whether the informally expressed interpretation is invalid on its face, and should reserve its detailed scrutiny for later agency actions that enforce or otherwise execute the interpretation. Meanwhile, the court's determination not to strike down the informal interpretation would not invest that interpretation with the force of law, and would not itself have the same force as would a full judicial interpretation of the statute. In this situation, the agency does not bind the court, and the court does not bind the agency.

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preclude the option of accepting an informal interpretation where there is no delegation. But the option should not survive. By accepting an agency interpretation, a court necessarily holds that that interpretation binds the public. In our system of government, an agency should bind the public (as well as the courts) only where Congress by delegation has authorized it to do so. Without the requisite delegation, the court should go no further than to extend Skidmore consideration. The dispositive act of interpretation should be the court's.

[182] I am indebted to Peter Strauss for sharing his insights on this aspect of the informal formats problem.

[183] See note 162, and text accompanying notes 109-113, supra.

IV. WHICH INTERPRETIVE FORMATS SHOULD BIND?

Which interpretations, then, should be recognized as carrying the force of law,[184] and therefore binding on the courts and the public?[185]

The answer is simple: only those that Congress intended to have the force of law. As explained,[186] the key question in each case is whether Congress delegated the authority to issue interpretations with the force of law *in this format*.

But, in the name of *Chevron*, courts have occasionally thought themselves obliged to accept agency interpretations set forth in informal formats, as to which it is exceedingly unlikely the needed delegations could be found or inferred. The opinions either ignored the delegation inquiry entirely, or assumed that a statutory gap[187] created a delegation sufficient to authorize the format as well as the precise substantive topic of the interpretation.

Thus, courts have accorded *Chevron* acceptance to interpretations set forth in an affidavit as to prior practice,[188] in manuals and guidelines,[189] in memoranda and informational bulletins,[190] in opinion letters,[191] in proposed regulations not yet adopted,[192] in explanatory comments accompanying publication of regulations,[193] in policy statements,[194] in interpretive regulations,[195] and in interpretations developed for purposes of the litigation itself.[196]

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[184] *See* text at notes 168-169 *supra.*

[185] *See* note 7 *supra.*

[186] Text at notes 162-177 *supra*.

[187] *See* text at notes 134-140 *supra*.

[188] Mattox v. FTC, 752 F.2d 116, 119 n. 6 (5th Cir. 1985).

[189] *E.g.*, Friends of Shawangunks, Inc. v. Clark, 754 F.2d 446, 450 (2nd Cir. 1985)(Dep't of Interior's Bureau of Outdoor Recreation Manual relied on to set aside inconsistent decision made in name of Secretary of Interior); White v. Bowen, 636 F.Supp. 1235, 1241 (S.D.N.Y. 1986)(Program Operations Manual System relied on, treated as interpretive rules exempt from notice-and-comment requirements of 5 U.S.C. §553). *See also* Nevada ex rel. Loux v. Herrington, 777 F.2d 529 (9th Cir. 1985)(internal general guidelines).

[190] Cook Inlet Native Ass'n v. Bowen, 810 F.2d 1471, 1474, 1476 (9th Cir. 1987); Lukhard v. Reed, 107 S.Ct. 1807, 1813-14 (1987).

[191] Almendarez v. Barrett-Fisher Co., 762 F.2d 1275, 1281-82 (5th Cir. 1985); Techworld Development v. D.C. Preservation League, 648 F.Supp. 106 (D.D.C. 1986).

On the other hand, courts have recognized that an interpretation lacks power to command Chevron acceptance if it has been expressed only in an informal format -- such as in interpretive rules and policy statements,[197] in letters and circulars,[198] in manuals,[199] or in argument during litigation[200] --

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[192] Liegl v. Webb, 802 F.2d 623, 627 (2nd Cir. 1986). See also Watkins v. Blinzinger, 789 F.2d 474, 475 n. 2 (7th Cir. 1986).

[193] Lukhard v. Reed, 107 S.Ct. 1807, 1813-14 (1987); Kean v. Heckler, 799 F.2d 895, 902 (3rd Cir. 1986). See also Chapman v. U.S. Dep't HHS, 821 F.2d 523, 527 (10th Cir. 1987).

[194] American Federation of Gov't Employees v. FLRA, 778 F.2d 850, 861 (D.C. Cir. 1985)("Interpretation and Guidance").

[195] Wisconsin Dep't of Health v. Bowen, 797 F.2d 391, 397-98 (7th Cir. 1986); Prater v. U.S. Parole Comm'n., 802 F.2d 948, 954-55 (7th Cir. 1986); American Medical Ass'n v. Heckler, 606 F.Supp. 1422, 1441 (S.D. Ind. 1985). See also Montana v. Clark, 749 F.2d 740, 745 (D.C. Cir. 1984)(Steps 2A and 2B under Chevron roughly parallel legislative and interpretive rules respectively); Griffon v. U.S. Dep't of HHS, 802 F.2d 146, 148 n.3 (5th Cir. 1986).

[196] FTC v. Evans Products Co., 775 F.2d 1084 (9th Cir. 1985); Todd v. Norman, 840 F.2d 608 (8th Cir. 1988); See also Church of Scientology v. IRS, 792 F.2d 153, 165-66 (D.C. Cir. 1986)(concurring opinion); Wayside Farms v. U.S. Dep't of HHS, 663 F.Supp. 945 (N.D. Ohio 1987).

[197] Vietnam Veterans v. Sec'y of Navy, 843 F.2d 528, 537-38 (D.C. Cir. 1988)("A binding policy statement is an oxymoron")(S. Williams, J.); National Latino Media Coalition v. FCC, 816 F.2d 785, 788 (D.C. Cir. 1987). See also Samaritan Health Svc. v. Bowen, 811 F.2d 1524, 1531 (D.C. Cir. 1987); Griffon v. HHS, 802 F.2d 146, 148 n. 3 (5th Cir. 1986); Brock v. Louvers & Dampers, Inc., 817 F.2d 1255, 1257-58 (6th Cir. 1987).

[198] Reed v. Blinzinger, 639 F.Supp. 130, 132 (S.D. Ind. 1986); Malloy v. Eichler, 628 F.Supp. 582, 593 (D. Del. 1986)(distinguishing HCFA interpretive letter from legislative regulations in Chevron and other limited-review cases), aff'd, 860 F.2d 1179 (3d Cir. 1988); Bank of New York v. Hoyt, 617 F.Supp. 1304, 1313 (D. R.I. 1985).

though it may merit respectful consideration as appropriate under the Skidmore doctrine.[201]

As has been recited, the key inquiry in each case should be the delegation inquiry: whether Congress intended an interpretation in this format to have the force of law.[202] Where Congress's delegatory intent can be discerned it should of course govern.

For the critical situation in which Congress has not indicated its delegatory intent, the court cannot simply assume that a "gap" in the substantive meaning of a statute automatically establishes a delegation whereunder any reasonable agency interpretation will bind the courts.[203] This approach wrongly throws the armor of limited review around all interpretations, regardless of the formats in which they are expressed. A more principled and discriminating approach is needed.

Some interpretive formats will consistently possess the force of law because the delegations respecting those formats consistently convey that binding force. Similarly, other formats will consistently be found to lack such force because such delegations are absent. These patterns can furnish the source for presumptions about the delegatory intent of Congress, to be applied where no specific basis exists to find or construct that intent. This approach will form part of the analysis that follows. It does not aim for fixed rules to govern the formats, because a variant Congressional intent in a particular case may call for a variant result. The aim, though, is to fashion a coherent and workable method of applying Chevron, recognizing that the binding effect of an interpretation depends in principal part on its format.

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[199] See Leigl v. Webb, 802 F.2d 623, 625-26 (2nd Cir. 1986). See also National Medical Enterprises v. Bowen, 851 F.2d 291 (9th Cir. 1988).

[200] William Bros., Inc. v. Pate, 833 F.2d 261, 165 (11th Cir. 1987); Brock on behalf of Williams v. Peabody Coal Co., 822 F.2d 1134, 1146 (D.C. Cir. 1987). See also Huffman v. Western Nuclear, Inc., 108 S.Ct. 2087, 2092 n. 9 (1988); Bresgal v. Brock, 843 F.2d 1163, 1168 (9th Cir. 1988).

[201] See e.g., Brock v. Louvers & Dampers, Inc., 817 F.2d 1255, 1258 (6th Cir. 1987); Dove v. Coupe, 759 F.2d 167, 172 (D.C. Cir. 1985); Malloy v. Eichler, 628 F.Supp. 582, 592 (D.Del. 1986); Bank of New York v. Hoyt, 617 F.Supp. 1304, 1313 (D. R.I. 1985).

[202] See text accompanying notes 153-171, supra.

[203] See text at notes 134-140 supra.

A. LEGISLATIVE RULES

Interpretations are often expressed through exercise of the agency's statutorily-delegated authority to make law in the form of rules.[204] Interpretations set forth in this format possess the fullest credentials to command judicial acceptance. They are reviewed under Step 2A, and are "given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute."[205]

The question may arise whether the "express delegation"[206] requisite for Step 2A treatment must be a delegation specific to the portion of the statute at issue. The answer must be "no"; interpretations authorized under general conferrals of rulemaking authority should qualify as well. The regulation involved in

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[204] The technical term of the APA is "rules," 5 U.S.C. §§ 551(4),(5), 553, but this paper often uses the common term "regulations," to signify those "rules" that are called "regulations," as in the Code of Federal Regulations. Ordinarily, a policy statement or opinion letter would not be called a "regulation," though it might be a "rule" within the APA. See National Automatic Laundry and Cleaning Council v. Shultz, 443 F.2d 689, 698 (D.C. Cir. 1971).

[205] Chevron, 467 U.S. at 844. See also Batterton v. Francis, 432 U.S. 416, 425 n. 9, 426 (1977).

By embodying interpretation of statutes, legislative rules do not become "interpretative rules," 5 U.S.C. § 553(b)(3)(A), (d)(2), which carry less force and can be promulgated more informally. See 2 Davis, Administrative Law Treatise 57 (2d ed. 1979). "When Congress delegates authority to make rules, the reviewing court lacks power to determine the content of those rules, even if the rules are an interpretation of the statute." 5 Id. at 279.

And of course not all legislative rules involve interpretations of statutes. Many simply legislate policy, as did, for example, the rules reviewed in Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983); they are subject to a somewhat different standard of judicial review. Id. See Breyer, Judicial Review of Questions of Law and Policy, 38 Ad. L. Rev. 363 passim (1986); Woodward & Levin, In Defence of Deference: Judicial Review of Agency Action, 31 Ad. L. Rev. 329, 339 (1979). But see Pierce, Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions, 41 Vand. L. Rev. 301 (1988).

[206] 467 U.S. at 843.

Chevron was itself authorized under a general delegation.[207] It is true that such general authorizations have sometimes been construed to confer only housekeeping or other limited powers, so that any substantive expressions under them would be treated as interpretive rather than legislative regulations.[208] But the more general tendency seems to accord legislative effect to rules issued under such general authorizations.[209] Obviously, their effect depends upon the delegatory intent of Congress in each case. But in those situations where the courts find that such general provisions do authorize legislative rulemaking, regulations under them should have force equal to those promulgated under specific grants.[210] Chevron has eliminated degrees of deference, except to the extent any exists between

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[207] Rule at 46 Fed. Reg. 50766 (Oct. 14, 1981), relying upon 42 U.S.C. § 7601(a)("The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this Act.")

[208] See e.g., Chrysler Corp. v. Brown, 441 U.S. 281, 309 (1979); United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1981), quoting Rowan Companies v. United States, 452 U.S. 247, 253 (1981)(for a regulation relying only on general authority to "prescribe all needful rules," 26 U.S.C. § 7805(a), "we owe the interpretation less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision").

[209] "Where the empowering provision of a statute states simply that the agency may 'make * * * such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973). See also Chrysler Corp. v. Brown, 441 U.S. 281, 308 (1979); National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973); National Foods Ass'n v. Weinberger, 512 F.2d 688 (2nd Cir. 1975), cert. den. 423 U.S. 827 (1975); Davis, 1982 Supp. to Admin. Law Treatise 175.

[210] See, e.g., National Ass'n for Better Broadcasting v. FCC, 849 F.2d 665 (D.C. Cir. 1988), applying Step 2A review to a regulation apparently authorized only under 47 U.S.C. § 303(r).

Step 2A and 2B;[211] it would seem profitless to recognize them as between two classes of concededly authorized legislative rules.[212]

It manifestly is far too late in the day to suggest that Chevron acceptance should apply only to interpretations embodied in legislative rules, although, interestingly, it is perfectly possible to read the opinion that way.[213] More expressive of Chevron's overall tone, and of its key language stressing delegation, is the analysis put forward here: that Chevron acceptance extends to all interpretations expressed in formats that Congress intended to be used to implement delegated law-making authority. To some of those formats we now turn.

For these formats, as always, the delegation must be sought. Where none is found or inferred, none should be presumed in any case where the agency has not expressed its interpretation, with finality and some formality, in a dispositive action -- an action that specifies immediate legal results or that definitively ordains results for the future. The informal, or tentative,[214] or advisory, or internal, or unpublicized interpretive expression will not ordinarily be a tool that Congress intends to implement its delegation of law-making authority. Additionally, an interpretation put forth in such a format ordinarily will not have been arrived at through a process that encompassed public or adversarial participation. Although the agency cannot bind the reviewing court by such an interpretation, its expertise is not lost to the court, which accords the interpretation the special consideration called for by Skidmore.

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[211] See text accompanying notes 128-131, supra.

[212] See Diver, Statutory Interpretation in the Administrative State, 133 U. Pa. L. Rev. 549, 594 (1985)("A broad rulemaking power is no less an indication of policymaking responsibility than is a narrow one.").

[213] Indeed, if read literally, this would be its purport. Its central passage speaks first of an express delegation of authority to elucidate the statute by regulation, and then of a legislative delegation that is only implicit, but still presumably a delegation of the same authority "to elucidate ... the statute by regulation." Chevron, 467 U.S. at 844. Only legislative rules would be covered in either case. Morton v. Ruiz, 415 U.S. 199 (1974), quoted at the beginning of the paragraph, dealt with delegation of legislative rulemaking authority. And the whole of the Chevron opinion makes perfect sense if read with the assumption that the Court was speaking only of deference to legislative rules.

[214] See Conecuh-Monroe Community Action Agency v. Bowen, 852 F.2d 581, 586-87 (D.C. Cir. 1988).

B. AGENCY ADJUDICATIONS

The concept of "adjudication" used here is that of the APA.[215] Generally, it refers to a final disposition of a specific matter directed to an individual or to a closed identifiable class. It includes formal trial-type proceedings, like those by which are determined such matters as denials or revocations of transportation and utility and securities licenses, eligibility to federal disability benefits, and violations of trade, election, labor and occupational safety laws.[216] It also includes less formal agency actions, often of a bureaucratic rather than a forensic nature, passing upon grants, reimbursements, state implementation plans, international trade matters, some sorts of welfare-type benefits, many environmental, health and safety matters, and numerous others. Often matters which are initially passed upon at a staff level can be carried into hearing proceedings, which sometimes are of a trial type and sometimes are not.

The mere possession of adjudicatory powers is not in itself sufficient to establish a delegation to interpret authoritatively, even within the agency's usual routine. A purely adjudicative agency, holding no rulemaking or other policymaking powers, "is not entitled to any special deference from the courts" for its interpretations.[217]

But the adjudicatory interpretation of an agency with policymaking powers, like that of the NLRB in Hearst,[218] is capable of binding the courts under Chevron.[219]

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[215] 5 U.S.C §§ 551(6),(7).

[216] See listings of agencies and of the formal proceedings they administer in Office of the Chairman, Admin. Conf. of the U.S., Federal Administrative Law Judge Hearings, Statistical Report for 1976-1978 (1980) (by Jeffrey Lubbers).

[217] Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268, 278 n. 18 (1980)(Stevens, J.). This is "axiomatic." United Steelworkers v. Schuylkill Metals, 828 F.2d 314, 319 (5th Cir. 1987)(re OSHRC). See also William Bros. v. Pate, 833 F.2d 261, 264 (11th Cir. 1987)(Benefits Review Board of Department of Labor); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2nd Cir. 1976)(Benefits Review Board is "entirely an umpiring agency")(per Friendly, J.).

[218] NLRB v. Hearst Publications, Inc. 322 U.S. 111 (1944).

[219] See, e.g., DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council, 108 S.Ct. 1392, 1397 (1988)(unfair labor practice); State of New York v. EPA, 852 F.2d 574 (D.C. Cir. 1988) (denial of petitions under Clean Air Act); Securities Industry Ass'n v. Bd. of Gov. FRS, 847 F.2d 890, 893 (D.C. Cir.

In inquiring whether an agency possesses delegated authority to act with the force of law through adjudicatory proceedings, a useful touchstone is the idea of "the usual administrative routine" of the agency.[220] Did Congress contemplate not only that the agency will act in the prescribed adjudicative fashion, but also that it should have the primary power to resolve the interpretive issues it thus encounters?[221]

1. Mixed Questions

For "mixed" questions of interpretation, where statutory terms are applied to detailed and specific facts, Hearst and the innumerable cases following it establish the existence of a delegation placing those interpretive questions in the usual administrative routine.[222] It is conceded on all hands that such mixed interpretive rulings are entitled to acceptance under Chevron,[223] and there seems no imaginable reason that Chevron acceptance should differ in any practical way from Hearst acceptance. Thus, on direct judicial review of the agency's mixed-question decision, its interpretation/application must be accepted by the court if it is reasonable.[224]

1988)(approval of bank underwriting commercial paper); Common Cause v. FEC, 842 F.2d 436, 439 (D.C. Cir. 1988)(determination not to take enforcement action); Alaska v. Lyng, 797 F.2d 1479, 1481 (9th Cir. 1986)(selection of grant lands from national forest); Massachusetts v. Sec'y of HHS, 749 F.2d 89, 96 n. 3 (1st Cir. 1984); Population Inst. v. McPherson, 797 F.2d 1062, 1069 (D.C. Cir. 1986)(grant of Agency for International Development funds); Humane Soc. of U.S. v. EPA, 790 F.2d 106, 116 (D.C. Cir. 1986)(permit for experimental use of pesticide).

[220] NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130 (1944), quoting Gray v. Powell, 314 U.S. 402, 411 (1941). See INS v. Cardoza-Fonseca, 107 S.Ct. 1207, 1221-22 (1987).

[221] See Massachusetts v. Sec'y of HHS, 749 F.2d 89, 96 (1st Cir. 1984)(interpretation was the kind of matter "Congress would have intended * * * to be given significant weight.").

[222] See notes 21-28 and accompanying text, supra.

[223] Even those who have suggested that pure questions of interpretation get no deference stress the binding effect of mixed interpretations. E.g., INS v. Cardoza-Fonseca, 107 S.Ct. 1207, 1221-22 (1987); International Union, UAW v. Brock, 816 F.2d 761, 765 n. 5 (D.C. Cir. 1987).

[224] See, e.g., the DeBartolo, SIA, Population Institute and Humane Society cases cited in note 219 supra. See also Nielsen Lithographing Co. v. NLRB, 854 F.2d 1063 (7th Cir. 1988).

But must the mixed-question interpretation be similarly honored when it is drawn into litigation collaterally, as in review of other agency actions or in proceedings to which the agency is not party? This probably should depend upon what resolution is given the controversy about whether "pure questions of interpretation" may be accorded Chevron acceptance.[225] In a mixed-question determination, the interpretation of statute is embedded in and dependent upon detailed facts (as was the NLRB's determination in Hearst that the newsboys were "employees" within the Act). If a court can derive from it a conclusion of sufficient generality to be applied elsewhere, that proposition perforce has been unsprung from the facts in which it was enmeshed, and becomes an abstraction or generality in the nature of a pure question (in Hearst, for example, whether a person can be an "employee" without being on the employer's payroll). It would seem at the same time to have escaped the delegation that gave authority to the mixed interpretation as a part of the administrative routine.

Whether a delegation exists sufficient to bind the courts on a pure question would, of course, be a matter for inquiry in each case.[226] That inquiry would be powerfully influenced by evidence that the Supreme Court had become hospitable to Chevron acceptance for pure-question interpretations, or, per contra, that it had declared that class of interpretations ineligible for such acceptance.

2. Pure Questions

The same analysis, of course, would govern both direct and collateral review of pure-question interpretations announced in adjudications. Perhaps in any event minor issues could be eligible for Chevron acceptance as part of the administrative routine contemplated by delegation, even if they are abstract and general and therefore "pure."[227] Indeed, the tone of Chevron pervasively suggests as much, and that suggestion does not seem disturbed by the later opinions questioning Chevron's applicability to pure issues.[228] And if we are to realize

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[225] See text at notes 69-89, supra.

[226] See text at notes 83-89, supra.

[227] Arguably, the issue resolved by the agency in Chevron (through rulemaking) fits this description.

[228] See cases cited in note 78 supra.

The courts in numerous cases have accepted, under Chevron, agency adjudicative interpretations on apparently pure questions: E.g., Clark-Cowlitz Jt. Oper. Agency v. FERC, 826 F.2d 1074 (D.C. Cir. 1987); Georgetown Steel Corp. v. U.S., 801 F.2d 1308 (Fed. Cir. 1988); Kean v. Heckler, 799 F.2d 895 (3rd Cir. 1986); Alaska v. Lyng, 797 F.2d 1479 (9th Cir. 1986); Wyckoff v. EPA, 796 F.2d

Chevron's benefits of national uniformity,[229] at least some classes of pure-question interpretations must be deemed acceptable. Otherwise, a nationwide wilderness of specific instances would result.

On the other hand, even if the binding force of pure-question interpretations is affirmed by the Supreme Court, there would remain issues as to which the essential delegation would not be found. An example may be the issue in the Highland Park case[230] as to whether the CIO had to file a noncommunist affidavit, which Congress probably did not entrust to the NLRB because of its large import or because the Board lacked expertise in national security legislation.[231] There are no doubt some issues, in other words, that Congress would want the generalist courts to resolve independently, without being controlled by particular agency perspectives.

To warrant acceptance, a pure-question interpretation should be pivotal to the agency's adjudicative decision. Disembodied propositions spoken *obiter* in adjudicative opinions should have no weight in the courts.[232]

3. Reasoned Decisions

It seems plain that agency interpretations, like other agency actions, must be the product of reasoned decisionmaking in order to be deemed sufficiently reasonable to command Chevron

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1197 (9th Cir. 1986); Railway Labor Exec. Assn. v. U.S., 791 F.2d 994 (2nd Cir. 1986); Ohio v. Ruckelshaus, 776 F.2d 1333 (6th Cir. 1985); Mattox v. FTC, 752 F.2d 116 (5th Cir. 1985); Al Tech Specialty Steel v. U.S., 651 F.Supp. 1421 (Ct. Int'l Trade 1986); Bayonne School Bd. v. Dep't of Education, 640 F.Supp. 470 (D.D.C. 1986).

[229] *See* Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093, 1121-24, 1129-33 (1981).

[230] Cited and discussed at notes 40-43 and accompanying text, *supra*.

[231] One may also wonder whether the courts would consider that resolution of the interpretive issues had been delegated to the agencies in, for example, NLRB v. Bell Aerospace Co., note 30 *supra*, Packard Motor Car Co. v. NLRB, note 31 *supra*, or Industrial Union Dep't, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980).

[232] *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969).

acceptance.[233] If the decision announces a change in the agency's interpretive views, a reasoned analysis is especially vital. The agency in effect is bound by its interpretation until it acts in a reasoned way to depart from it.[234]

Thus, either the adjudicatory decision itself or the document upon which it relies should explain the agency's reasoning. Where it applies an adequately-reasoned legislative rule[235] or prior adjudicatory decision,[236] the new adjudicatory interpretation incorporates that reasoning even if it tenders none of its own. A rather different analysis obtains where reliance is placed upon a lesser instrument -- such as a manual or a policy statement[237] -- that would not itself command Chevron acceptance. It is the nature of such a document that, in a later adjudicatory proceeding, the agency is neither bound to follow it nor entitled to treat others as bound by it; the agency must at that time entertain challenges to the interpretation previously expressed, and decide whether to adopt it.[238] However, if the agency then consciously chooses the prior interpretation and ratifies the reasoning there expressed, its decision should bind, at least on direct review. The agency's adjudicative action within its usual administrative routine will give force of law to the interpretation expressed in the earlier action, whose reasoning in turn can support the otherwise-unexplained adjudicatory application.[239] But if the earlier informal interpretation is just mechanically applied, a court should have no obligation to accept it.

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[233] See Motor Vehicle Mfrs Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 42-43, 57 (1983); SEC v. Chenery Corp., 318 U.S. 80 (1943); Colorado Interstate Gas Co. v. FERC, 850 F.2d 769, 774-75 (D.C. Cir. 1988); Democratic Cong. Campaign C'tee v. FEC, 831 F.2d 1131, 1135 (D.C. Cir. 1987). See also Common Cause v. FEC, 842 F.2d 436, 449 (D.C. Cir. 1988); Barnett v. Weinberger, 818 F.2d 953, 963 (D.C. Cir. 1987).

[234] See Motor Vehicle Mfrs Ass'n. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 41-42 (1983); Colorado Interstate Gas Co. v. FERC, 850 F.2d 769, 774-75 (D.C. Cir. 1988). "[T]he principles announced in an adjudication cannot be departed from in future adjudication without reason." Bowen v. Georgetown Univ. Hospital, 109 S.Ct. 468, 476 (1988) (Scalia, J., concurring).

[235] See. e.g., Aliceville Hydro Assoc. v. FERC, 800 F.2d 1147, 1150 (D.C. Cir. 1986); Capitol Technical Services v. FAA, 791 F.2d 964, 970-71 (D.C. Cir. 1986).

[236] See, e.g. United Retail Workers Union Local 881 v. NLRB, 774 F.2d 752, 762-63 (7th Cir. 1985).

[237] See, e.g., Knutzen v. Eben Ezer Lutheran Housing Center, 815 F.2d 1343, 1349-51 (10th Cir. 1987) (manual); Regular Common Carrier Conf. v. U.S., 803 F.2d 1186, 1194-95 (D.C. Cir. 1986) (policy statement).

[238] Pacific Gas & Electric Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974). See Morton v. Ruiz, 415 U.S. 199 (1974), discussed at note 137 and in text accompanying notes 154-161, supra.

4. Lower-Level Decisions

Clearly, the reasoned adjudicatory interpretations of agency heads and their immediate delegates should qualify for the judicial acceptance called for by Chevron. But should the interpretive decisions of lower-level officials so qualify? The few cases found are unhelpful.[240] Again, the question should be one of delegation: would Congress intend the low-level decision to bind?[241] The matter may turn also upon the completeness with which the agency heads themselves may have delegated their powers to the decision maker, and upon whether all levels of appeal within the agency were exhausted.[242] In most cases prudence would probably dictate that Chevron acceptance be extended, if at all, only on direct review and not in collateral proceedings. Of course Skidmore consideration would be appropriate.

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[239] See N.Y. State Dep't of Soc. Serv. v. Bowen, 648 F.Supp. 850 (D.D.C. 1986). Only that portion of the earlier document that was determinative of the adjudicatory outcome should be treated as binding.

[240] See Caiola v. Carroll, 851 F.2d 395, 399 (D.C. Cir. 1988)(lower level official's interpretation of agency's regulations denied Chevron acceptance, partly because official was not head of agency); Gatson v. Bowen, 838 F.2d 442, 447, 449 (10th Cir. 1988)(SSA Administrative Law Judge's interpretation treated as that of SSA, but was rejected as incorrect, with no citation of Chevron); U.S. v. Lockheed, 817 F.2d 1565, 1567 (Fed. Cir. 1987)(Armed Services Board of Contract Appeals' Interpretation is "freely reviewable" under review statute, 41 U.S.C. § 609); Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 437 (D.C. Cir. 1986)("no reason why the letter from the head of the EPA's Pesticide Division * * * would not be entitled to deference"); Aliceville Hydro Assoc. v. FERC, 800 F.2d 1147, 1152 (D.C. Cir. 1986)("informal practice among relatively low-level staff members" allowing exceptions to rule did not undercut Chevron acceptance of rule). See also AFGE v. FLRA, 840 F.2d 947, 952 (D.C. Cir. 1988).

[241] One pre-Chevron instance where Congress had such an intention is Ford Motor Co. v. Milhollin, 444 U.S. 555, 566-67 (1980). See also 47 U.S.C. § 155(c)(3), providing that FCC bureau actions, if not reviewed by the full Commission, "have the same force and effect" as actions of the Commission.

[242] See Kixmiller v. SEC, 492 F.2d 641 (D.C. Cir. 1974).

C. PROCEDURAL RULES AND ACTIONS

An interesting group of cases has applied Chevron's Step 2 to uphold interpretations expressed in agencies' procedural rules and in other determinations of how they will proceed in the exercise of their powers.

The binding effect of procedural regulations issued pursuant to statutory authority is clear enough,[243] and the courts uphold these if they are reasonable and consistent with statute, citing Chevron where there is a statutory procedural scheme to interpret.[244]

By apparent analogy to these cases, a number of decisions have applied Chevron analysis to interpretations upon which the agencies rested other sorts of decisions about how they would proceed. In Japan Whaling Association v. American Cetacean Society,[245] the Secretary of Commerce determined that it better served the legislation implementing the International Convention for the Regulation of Whaling to accept Japan's offer of an agreement to phase out its whaling, rather than to certify Japan's whaling activities to the President for possible sanctions. Following straightforwardly through the Chevron steps, Justice White for the majority found that the statute did not forbid the Secretary's procedure, and that withholding certification in the circumstances reflected a reasonable construction of ambiguous statutory language.[246] In Young v. Community Nutrition Institute,[247] the Food and Drug Administration chose not to promulgate a tolerance regulation with respect to a certain carcinogenic mold, but instead proceeded by a less formal process to set an "action level." Justice O'Connor found the statute potentially mandating regulations to be ambiguous, and held the FDA's interpretation to be sufficiently rational to require judicial acceptance under Chevron.[248] In United States v. City of Fulton,[249] ambiguous statutory language was reasonably construed by the Secretary of Energy to permit interim increases in the rates charged by regional power marketing administrations.[250] And in Chemical Manufacturers Association v. National Resources Defense Council,[251] the majority upheld EPA's practice of granting "fundamentally different factor" variances, pursuant to regulations, as consistent with the Clean Water Act and reasonable.[252]

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[243] See Boske v. Comingore, 177 U.S. 459, 467-70 (1900); Service v. Dulles, 354 U.S. 369, 372 (1957)("regulations validly prescribed by a government administrator are binding upon him as well as the citizen"); Accardi v. Shaughnessy, 347 U.S. 260 (1954).

[244] See, e.g., Committee to Save WEAM v. FCC, 808 F.2d 113, 119 (D.C. Cir. 1986); Tillett v. Carlin, 637 F.Supp. 245, 250, 253 (D. Conn. 1986).

[245] 106 S.Ct. 2860 (1986)(5-4).

[246] Id. at 2867-68.

[247] 106 S.Ct. 2360 (1986).

In all four of these cases, the Court reviewed the statutory authority for the agencies' actions and, though it did not expressly speak of "delegation" to interpret in those ways, viewed the statutes as contemplating such interpretive powers.[253] Much the same thing has occurred in several lower court cases.[254]

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[248] Id. at 2364-65.

[249] 106 S.Ct. 1422 (1986).

[250] Id. at 1428-30.

[251] 470 U.S. 116 (1985) (5-4).

[252] Id. at 125-126.

[253] In Japan Whaling, 106 S.Ct. at 2867-68, 2872 ("Congress granted the Secretary the authority to determine whether a foreign nation's whaling in excess of quotas diminishes the effectiveness of the IWC, and we find no reason to impose a mandatory obligation upon the Secretary to certify that every quota violation fails that standard."); in Young, 106 S.Ct. at 2365 ("To interpret Congress's statutory language to give FDA discretion to decide whether tolerance levels are necessary to protect the public health is therefore sensible"); in Fulton, 106 S.Ct. at 1430 ("Congress, in declining to set out a detailed mandatory procedural scheme, apparently intended to leave the agency substantial discretion"); in CMA, 470 U.S. at 131 ("Since the dispute is therefore reduced to an argument over the means used by EPA to define subcategories of indirect dischargers in order to achieve the goals of the Act, this is a particularly persuasive case for deference to the Agency's interpretation").

[254] E.g., Fernandez v. Brock, 840 F.2d 622 (9th Cir. 1988)(determination that an authorized action is discretionary); Natural Resources Defensive Council v. EPA, 804 F.2d 710 (D.C. Cir. 1986)(withdrawal of proposed regulations); Railway Labor Exec's Ass'n v. ICC, 784 F.2d 959, 969 (9th Cir. 1986)(determination that power is discretionary); Jones v. Gordon, 621 F.Supp. 7 (D. Alaska 1985)(determination of whether environmental impact statement is required).

Agency "methodology" was upheld under Chevron in Ceramica

These cases show a substantial sense of upholding the agencies' procedural determinations because Congress had given them appropriate authority so to interpret.

In the same pattern, but stronger, is United States v. Riverside Bayview Homes, Inc.[255] The cases just discussed entailed issues affecting the procedural powers of the agencies within their respective substantive spheres. But Riverside Bayview additionally concerned "a problem of defining the bounds of [the agency's] regulatory authority,"[256] as to which, citing Chevron and CMA, Justice White for a unanimous Court held that "our review is limited to the question whether [the agency's construction] is reasonable."[257] On this basis the Corps of Engineers acted permissibly in redefining the term "waters of the United States" in the Clean Water Act to enable it to require permits to discharge fill material into freshwater wetlands. The case seems to hold that, even when an agency interprets its enabling legislation to enlarge its jurisdiction, its interpretation will be deemed suitable to receive Chevron acceptance.[258] Although the issue is beyond the scope of this Article, one may wonder whether Chevron will enduringly displace the deeply-rooted doctrine that an "agency may not finally decide the limits of its statutory power. That is a judicial function."[259] Compromising this precept would create the

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Regiomontana v. U.S., 636 F.Supp. 961, 966 (Ct. Int'l Trade 1986). See also Alder v. U.S. 785 F.2d 1004, 1007 (Fed. Cir. 1986).

Sometimes agency interpretations of this type are rejected under Chevron Step 1 analysis. E.g., Bethesda Hospital Ass'n v. Bowen, 108 S.Ct. 1255 (1988); Int'l Brotherhood of Teamsters v. ICC, 801 F.2d 1423 (D.C. Cir. 1986); U.S. Army Engineer Center v. FLRA, 762 F.2d 409 (4th Cir. 1985); American Methyl Corp. v. EPA, 749 F.2d 826 (D.C. Cir. 1984).

[255] 106 S.Ct. 455 (1955).

[256] Id. at 462.

[257] Id. at 461.

[258] The Court found that "Congress acquiesced in the administrative construction." 106 S.Ct. at 464. The key significance given this factor may mitigate any inappropriateness of employing Chevron Step 2 analysis rather than independent interpretation in these circumstances.

[259] Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946). See also Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910, 916 (3rd Cir. 1981)("government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission" and "therefore, an agency ruling that broadens its

possibility that autocratic actions must be ratified by the courts. Despite such concerns, the courts seem disposed to presume that they will be bound by reasonable interpretations embodied in an agency's procedural regulations or other dispositive determinations of how it will carry on its work.

D. INTERPRETIVE RULES AND POLICY STATEMENTS

No such presumption should be tolerated for interpretive rules or policy statements,[260] or similar formats. Their precisely relevant quality is that they lack the force of law -- that is, they cannot bind the courts even if they are consistent with statute and reasonable.[261] This circumstance is not changed by Chevron:

> Thus an interpretive rule does not have the force of law and is not binding on anyone, including the courts, though the status conferred on an agency as the delegate of Congress and by its expertise often leads courts to defer to the agency's interpretation of its governing statute. See Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1154 n. 26 (D.C. Cir. 1977)("Legislative rules have the full force of law and are binding on a court subject only to

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own jurisdiction is examined carefully"); Independent Ins. Agents of America v. Bd. of Gov. FRS, 838 F.2d 627, 632 (2nd Cir. 1988); Morrison, in Levin et al., Judicial Review of Administrative Action in a Conservative Era, 39 Ad.L.Rev. 353, 374-75 (1987).

[260] For definitions of interpretive rules and policy statements, see Attorney General's Manual on the Administrative Procedure Act 30 n. 3 (1947); 2 K. Davis, Administrative Law Treatise §§ 7.5, 7.8, 7.10, 7.12 (2d ed. 1979) and corresponding sections in 1982 Supp. to Admin. Law Treatise. See also Chrysler Corp. v. Brown, 441 U.S. 281, 301-304 (1979); Board of Educ. of City of New York v. Harris, 622 F.2d 599, 613 (2nd Cir. 1979).

[261] See General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1977), quoted at note 50 supra; Skidmore v. Swift & Co., 323 U.S. 134, 140 (1940), quoted at note 49 supra; General Motors Corp. v. Ruckelshaus, 724 F.2d 979, 984-85 (D.C. Cir. 1983); 2 K. Davis, Administrative Law Treatise §§ 7.9, 7.13, 7.15 (2d ed. 1979); R. Pierce, S. Shapiro & P. Verkuil, Administrative Law and Process §§ 6.4.4a, 6.4.4b (1985).

"[A] court is not required to give effect to an interpretive regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise. See General Electric Co. v. Gilbert, * * * Skidmore v. Swift & Co., * * * ." Batterton v. Francis, 432 U.S., 416, 425 n. 9 (1977).

See also Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 682 (D.C. Cir. 1982).

> review under an arbitrary and capricious standard. Interpretive rules do not have the force of law and even though courts often defer to an agency's interpretive rule they are always free to choose otherwise").[262]

And: "A binding policy statement is an oxymoron."[263]

Where the reviewing court has found no delegation of power to interpret authoritatively in such a format, then, its proper approach is not that of Chevron Step 2 but rather that of Skidmore.[264] A useful model is that of Judge Starr who, after pointing out the "legislative effect" that interpretations have under Chevron where Congress has explicitly or implicitly delegated authority to the agency, applied the law in this way:

> Determining the extent of deference in the case at hand therefore requires an examination of the authority conferred by Congress on the Secretary with respect to each regulation in question. * * *
>
> We turn first to the Secretary's mandated two-step process for determining the prevailing wage in a locality. * * * [T]he language of the statute seems best read as granting the authority to make the prescribed wage determination but not to define "locality" with near finality shielded by high deference. Under our approach, the Secretary's regulation interpreting "locality" as the location of each individual potential contractor constitutes an interpretive ruling that carries some weight and attracts some deference, but does not enjoy the highest degree of deference available under "arbitrary and capricious" review.
>
> An even clearer case of an interpretive ruling is the Secretary's determination [concerning successor contracts]. There is no language in the statute indicating a delegation to the Secretary of the authority to make such a determination, and we therefore accord the Secretary's decision only some deference and weight.[265]

The lower federal courts have occasionally applied Chevron Step 2 to interpretive rules, policy statements and their functional equivalents. Sometimes the court accepts the interpretation without apparent heed to its format, as was done in Conley v. Brewer[266] with respect to an interpretive regulation, and in American Federation of Gov't Employees v. Federal Labor Relations Authority[267] where a policy statement was involved.

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[262] National Latino Media Coalition v. FCC, 816 F.2d 785, 788 (D.C. Cir. 1987).

[263] Vietnam Veterans v. Sec'y of the Navy, 843 F.2d 528, 537 (D.C. Cir. 1988).

[264] For an alternate standard for pre-enforcement review in some circumstances, see text accompanying notes 182-183, supra.

[265] American Federation of Labor v. Donovan, 757 F.2d 330, 341-42 (D.C. Cir. 1985).

Even where they recognize that these formats are somehow less potent than legislative rules, courts on occasion have felt bound to accord them Chevron acceptance. In Prater v. U.S. Parole Commission,[268] for example, the court said that the agency's guidelines were "interpretive rather than legislative" but accepted them under Chevron Step 2.[269] Chevron acceptance was similarly extended to a "Dear Doctor letter" (concerning Medicare) from the Secretary of HHS, which the court treated as an interpretive rule.[270] In a case where the interpretation of the HHS Secretary was set forth in a Medicaid Action Transmittal, the court said:

> The district court was correct in refusing to give the Secretary's interpretation here "legislative effect" -- this case, unlike Schweiker [v. Gray Panthers, 453 U.S. 34 (1981) and Batterton [v. Francis, 432 U.S. 416 (1977)] does not involve regulations promulgated upon an express delegation from Congress, by formal rulemaking. But the district court was still bound to defer to his interpretation if reasonable and statutorily permissible.[271]

As discussed above, a practice of routine acceptance for interpretations expressed in these formats would endow them with force of law when that was not intended by Congress, in abdication of judicial duties under Marbury.[272] The agency by this process would bind the public, without itself being bound by interpretations in these formats.[273] And since these formats are exempt from APA public participation requirements,[274] an especially odious frustration is visited upon the affected private parties: They are bound by a proposition they had no opportunity to help shape and will have *no* meaningful opportunity to challenge when it is applied to them.[275]

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[266] 652 F. Supp. 106, 109 (W.D. Wis. 1986)(accepting Parole Commission's interpretive regulation and explanatory statement that "good time" credits expire when prisoner is released on parole).

[267] 778 F.2d 850, 852, 856, 861 (D.C. Cir. 1985)(accepting FLRA "Interpretation and Guidance" holding that agency head may disapprove contract containing a provision ordered by Federal Service Impasses Panel but contrary to law).

[268] 802 F.2d 948 (7th Cir. 1986) (en banc 7-3).

[269] Id. at 954-55. The opinion might be read as using the interpretation as an aid to finding clear intent in Chevron Step 1, but this seems doubtful.

[270] American Medical Ass'n v. Heckler, 606 F. Supp. 1422, 1440-41 (S.D. Ind. 1985).

[271] Wisconsin Dep't of Health v. Bowen, 797 F.2d 391, 397 (7th Cir. 1986); cert. granted, 107 S.Ct. 926 (1987), cert. dismissed, 108 S.Ct. 1495 (1988). See also Samaritan Health Svc. v. Bowen, 811 F.2d 1524, 1529-31 (D.C. Cir. 1987) (manual treated as an interpretive rule rejected as unreasonable).

E. MANUALS, GUIDELINES, STAFF INSTRUCTIONS, OPINION LETTERS

The same rules should apply to this category[276] as apply to interpretive rules and policy statements.[277] Interpretation presented in these formats do not have the force of law.[278]

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[272] See text accompanying notes 142-143, *supra*.

[273] *See* Pacific Gas & Electric v. FPC, 506 F.2d 33 (D.C. Cir. 1974).

[274] 5 U.S.C. § 553(b),(c).

[275] In a slightly different context, Judge Starr has observed: "Agencies may yield to temptation and seek to shield their regulations from the scrutiny occasioned by notice-and-comment procedures, choosing instead to cast would-be regulations as interpretative rules. The rule would still, of course, be subject to scrutiny in a subsequent proceeding, but this fact may be of little comfort to prospective commentors, given the deference accorded agency views in any such proceedings. *See Chevron* * * * ." Community Nutrition Institute v. Young, 818 F.2d 943, 953 (D.C. Cir. 1987) (concurring and dissenting opinion). The courts would seldom have occasion to pass upon an agency's failure to consider alternate interpretations which commentors might have put forward if § 553(c) procedures had been followed.

[276] Included here are manuals, handbooks, guidelines, staff instructions, opinion letters, explanatory statements, testimony presented to Congress, speeches, releases and the like.

[277] Indeed, interpretations presented in these formats are sometimes deemed to be "interpretative rules" or "general statements of policy" for the purpose of applying exemptions to the procedural rulemaking requirements of the APA. 5 U.S.C. Sec. 553 (b)(A), (d)(2). *E.g.*, Prater v. U.S. Parole Comm'n, 802 F.2d 948, 954-55 (7th Cir. 1986); White v. Bowen, 636 F. Supp. 1235, 1240-41 (D. Conn. 1986); American Medical Ass'n v. Heckler, 606 F. Supp. 1422, 1440-41 (S.D. Ind. 1985)

Nevertheless, courts have sometimes shown a readiness to extend Chevron's style of acceptance to interpretations expressed in these informal formats. In Hicks v. Cantrell,[279] for example, the Fourth Circuit gave controlling effect to a letter from a Department of Labor regional administrator to the Virginia Employment Commissioner, stating that the Secretary interpreted the Federal Supplemental Compensation Act as allowing states the option of refusing to waive overpayments. "Lacking a clear Congressional intent to the contrary, we must conclude that the Secretary's interpretation is both reasonable and permissible, although it may be inconsistent with prior interpretations."[280]

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[278] Thus, the court in Leigl v. Webb, 802 F.2d 623 (2nd Cir. 1986), rejected the interpretation set forth in an HEW Action Transmittal, incorporated into the agency's Medical Assistance Manual, stating that "a manual does not comprise regulations * * * [but] [r]ather, a manual contains interpretive guidelines that the court may disregard after due consideration." Id. at 626. (However, the court accepted an interpretation set forth in a notice of proposed rulemaking.) Similarly, the Sixth Circuit did not accept a Wage and Hour Opinion Letter's interpretation, whose authority it deemed to be only "persuasive and not precedential." Brock v. Louvers & Dampers, Inc., 817 F.2d 1255, 1258 (6th Cir. 1987). In Malloy v. Eichler, 628 F. Supp. 582 (D. Del. 1986), aff'd, 860 F.2d 1179 (3rd Cir. 1988), the Secretary of HHS insisted that her views embodied in Health Care Financing Administration Letter 85-10 were "entitled to a 'legislative effect' that can be overturned only if she has exceeded her authority or acted in an arbitrary or capricious manner." Id. at 592. But the court stated that "letter 85-10 is not a legislative or substantive regulation * * * [but] is more closely akin to the statutory interpretation traditionally left to the courts than it is to the statutory definition delegated to the Secretary. Id. at 593 (emphasis in original). Accord, Reed v. Blinzinger, 639 F. Supp. 130 (S.D. Ind. 1986). See Schweiker v. Hansen, 450 U.S. 785, 789 (1981) (13-volume SSA Claims Manual "has no legal force"). Of course, an interpretation expressed in one of these informal formats may be based upon documents carrying the force of law; see e.g., the letter of the Commissioner of Customs, based on regulations, discussed by Justice Scalia in K Mart Corp. v. Cartier, Inc., 108 S.Ct. 1811, 1832-33 (1988) (concurring and dissenting opinion).

[279] 803 F.2d 789 (4th Cir. 1986).

[280] Id. at 794. In another part of the opinion, the court indicated that the same result might be required by the plain meaning of the statute. Id. at 792. See also Mead Corp. v. Tilley, 109 S.Ct. 2156, 2161-64 (1989)(opinion letters and guidelines).

The operative interpretation accepted by the court in White v. Bowen,[281] was an HHS Program Operations Manual System memorandum which, as the court pointed out, was not published in the Federal Register.[282] The court in Almendarez v. Barrett-Fisher Co.[283] reached its own interpretation of the Farm Labor Contractor Act, but added that it was "obliged to defer to reasonable interpretation of a statute" set forth in a Department of Labor Wage-Hour Administrator's opinion letter.[284]

In Cook Inlet Native Ass'n v. Bowen the interpretation subsisted initially in a memorandum of the Assistant Solicitor for Indian Affairs, which was adopted through a letter by the Indian Health Service; it later was expressed in the periodical Nature News and B.I.A. Bulletin, in the Village Self-Determination Workbook, and in the Alaska Native Village Self-Determination Briefing Book, all evidently BIA publications.[285] Finding that the legislative history showed no contrary intent, the court said that it "must, therefore, defer to that interpretation."[286]

Again, the standard for review of interpretation in these formats should be not the acceptance of Chevron Step 2, but rather an independent scrutiny that includes the respectful consideration called for by Skidmore.[287]

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[281] 636 F. Supp. 1235 (S.D. N.Y.).

[282] Id. at 1239. See also Friends of Shawangunks, Inc. v. Clark, 754 F.2d 446, 450 (2nd Cir. 1985) (DOI Bureau of Outdoor Recreation Manual).

[283] 762 F.2d 1275 (5th Cir. 1985).

[284] Id. at 1281-82. But see Skidmore v. Swift & Co., 323 U.S. 134 (1940).

See also American Medical Ass'n v. Heckler, 606 F. Supp. 1422 (S.D. Ind. 1985) (letter to doctors from HHS secretary accepted under Chevron Step 2); Holcomb v. United Automotive Ass'n of St. Louis, 658 F. Supp. 84 (E.D. Mo. 1987) (court appeared prepared to accord "considerable deference" to opinion letter, but concluded it did not support plaintiff's claim).

[285] 810 F.2d 1471, 1474 (9th Cir. 1987).

[286] Id. at 1476. See also Lukhard v. Reed, 107 S.Ct. 1807, 1813-14 (1987) (reference to Handbook Supplement for Administrative Use, a brief amicus curiae, letters and a memorandum).

[287] "A finding that her views lack legislative effect will not foreclose the issue because an administrative interpretation is entitled to substantial weight when it satisfies the conditions enumerated in Skidmore v. Swift & Co. * * *"). Malloy

F. LITIGATING POSITIONS

Judge Learned Hand has well said:

> [A] public officer, charged with the enforcement of a law, is different from one who must decide a dispute. If there is a fair doubt, his duty is to present the case for the side which he represents, and leave decision to the court, or the administrative tribunal, upon which lies the responsibility of decision. If he surrenders a plausible construction, it will, at least it may, be surrendered forever; and yet it may be right. Since such rulings need not have the detachment of a judicial, or semi-judicial decision, and may properly carry a bias, it would seem that they should not be as authoritative * * * .[288]

It is hard to conceive that an interpretation put forward in argument, without previously having been laid down in a form bearing the force of law, could bind the court to which it is presented. An agency may not simply declaim, "this is our interpretation -- under Chevron you must accept it," and prevail. It would exceed the bounds of fair play to allow an institutionally self-interested advocacy position, which "may properly carry a bias," to control the judicial outcome (provided only it is consistent with statute and reasonable). Even the cynical should balk at assuming that Congress has delegated such a power to judge one's own cause.

It is one thing to extend special consideration to the agency view, even when it is expressed only in a litigation position with no dispositive rule or adjudicative action to back it up. Skidmore counsels no less, as part of the court's independent review.[289] It is quite something else for a court to deem itself bound by such an interpretation. Despite words of caution,[290] courts occasionally have shown some disposition to do

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v. Eichler, 628 F. Supp. 582, 592 (D. Del. 1986), aff'd, 860 F.2d 1179 (3rd Cir. 1988). See also Dove v. Coupe, 759 F.2d 167, 171-72 (D.C. Cir. 1985) (Wage & Hour Release, reprinted in Wage Hour Manual, given "respectful consideration" and upheld); Tony & Susan Alamo Foundation, 471 U.S. 290, 297 (1985).

For an alternate standard for pre-enforcement review in some circumstances, see text accompanying notes 182-183, supra.

[288] Fishgold v. Sullivan Drydock & Repair Corp., 154 F.2d 785, 789 (2nd Cir. 1946), affirmed 328 U.S. 275 (1946).

[289] See text at notes 47-52, supra.

[290] E.g., "There is some question to begin with, whether an interpretive theory put forth only by agency counsel in litigation, which explains agency action that could be explained on different theories, constitutes an "an agency position" for

the latter, citing Chevron.[291] Those courts may have confused their obligations under Chevron with those under Skidmore. Independent deliberation of the interpretive issue, joined with special consideration of the agency's views, is the proper judicial posture.[292]

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purposes of Chevron." Church of Scientology of Cal. v. IRS, 792 F.2d 153, 162 n.4 (D.C. Cir. 1986) (en banc, 7-3) (Scalia, J.), but see id. at 165-66 (Silberman, J. concurring). "[W]e do not agree that the Director's mere litigating position is due to be given deference. Common sense tells us that if deference were always to be given to the Director's litigating position, then the claimant would be effectively denied the right to appellate review. * * * If the Secretary has a position he wishes to express, be can do it through the proper forum, i.e., the implementation of new clarifying regulations." William Bros., Inc. v. Pate, 833 F.2d 261, 265 (11th Cir. 1987). "The Department did not construe § 1802(3) in its amended form until the onset of this litigation. The Secretary's construction is entitled to no more deference than is the interpretation of any party to the suit." Bregsal v. Brock, 844 F.2d 1163, 1168 (9th Cir. 1987). See also Huffman v. Western Nuclear, Inc., 108 S.Ct. 2087, 2092 n.9 (1988); Securities Industry Assn. v. Board of Governors FRS, 468 U.S. 137, 143-44 (1984); Todd v. Norman, 840 F.2d 608, 614 (8th Cir. 1988) (Lay, J. dissenting); Brock on behalf of Williams v. Peabody Coal Co., 822 F2.d 1134, 1146 (D.C. Cir. 1987).

[291] See, e.g., Duggan v. Board of Educ. of East Chicago Heights, 818 F.2d 1291, 1296 (7th Cir. 1987); FTC v. Evans Products Co., 775 F.2d 1084, 1086 (9th Cir. 1985); Techworld Development v. D.C. Preservation League, 648 F.2d 106, 121 (D.D.C. 1986); Todd v. Norman, 840 F.2d 608, 612 (8th Cir. 1988); Ciba-Geigy v. EPA, 801 F.2d 430, 437 (D.C. Cir. 1986); D & W Food Centers v. Block, 786 F.2d 751, 757 (6th Cir. 1986); Wayside Farms v. Dep't of HHS, 663 F. Supp. 945, 951-52 (N.D. Ohio 1987); Church of Scientology of Cal. v. IRS, 792 F.2d 153 165-66 (D.C. 1986) (concurring opinion), but see Getty v. FSLIC, 805 F.2d 1050, 106 at nn. 17-18 (D.C. Cir. 1986).

[292] E.g., Patel v. Quality Inn South, 846 F.2d 700, 703 (11th Cir. 1988); FEC v. Sailors' Union of the Pacific Political Fund, 828 F.2d 502, 505-6 (9th Cir. 1987); Rybicki v. Hartley, 792 F.2d 260, 262 (1st Cir. 1986). "We have never applied the principle of [Chevron] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." Bowen v. Georgetown Univ. Hospital, 109 S.Ct. 468, 473 (1988)

G. MISCELLANEOUS FORMATS

A variety of other forms of interpretive expression can be found in the case reports. Some can fairly be seen as having issued pursuant to an implied delegatory intent that they bind the courts. Thus, the Supreme Court cited Chevron and accepted as dispositive an FDA statement, published with new regulations in the Federal Register, that it did not intend to pre-empt state regulation of the subject matter.[293] Where the Farm Credit Administration had statutory power to approve and adopt bylaws for its regional production credit associations, FCA action to vest in its intermediate credit banks the power of removal under the bylaws was held a "reasonable policy decision" under Chevron.[294] The District of Columbia Circuit held ripe and reviewable (in the face of Heckler v. Chaney)[295] an interpretation pronounced in the Statement of Reasons for a decision not to take enforcement action, and remanded to the district court for review of the interpretation's reasonableness under Chevron.[296]

Other formats treated with Chevron Step 2 respect cannot so readily be viewed as resting upon an implied delegated power to bind. An Antitrust Division affidavit was the object of Chevron acceptance in Mattox v. FTC,[297] although the court also relied upon an identical interpretation in a decision of the FTC. Another case referred to regulations that had been published in proposed form but not yet adopted; the Second Circuit "deferr[ed]" to the notice of proposed rulemaking, which it chose to treat as clarification of a prior policy.[298] A close case is Chapman v. Dep't of HHS,[299] where the regulations did not cover the specific point but explanatory material published with the final regulations did. The court accepted the explanatory interpretation.[300] The matter at issue concerned the authorized amount of civil penalties; when construing a penalty statute, it is arguably inappropriate to rely upon the explanatory gloss where the regulation itself is not clearly dispositive. A more precise approach in all three of these cases would have been to treat the agency interpretation as information entitled to special consideration as the court deliberates its own best estimate of the statute's meaning.

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[293] Hillsborough County, Fla. v. Automated Medical Labs. Inc., 471 U.S. 707,714-15 (1985).

[294] Bailey v. Federal Intermediate Credit Bank of St. Louis, 788 F.2d 498, 504 (8th Cir. 1986). The intermediate bank had statutory powers of supervision over the production credit association. Id. at 502.

[295] 470 U.S. 821 (1985).

[296] International Union, UAW v. Brock, 783 F.2d 237, 251 (D.C. Cir. 1986). See also Theodus v. McLaughlin, 852 F.2d 1380, 1384 (D.C. Cir. 1988).

[297] 752 F.2d 116 (5th Cir. 1986).

[298] Liegl v. Webb, 802 F.2d 623,627 (2nd Cir. 1986). The court rejected the interpretation as set forth in a manual.

[299] 821 F.2d 523 (10th Cir. 1987).

CONCLUSION

With these, as with all formats, the inquiry at the threshold of Chevron Step 2 should be whether Congress has expressly or impliedly delegated the authority to issue interpretations having the force of law in the format used by the agency. If it has, the court should proceed with the reasonableness inquiry of Step 2. If Congress has not so delegated, the court generally should undertake an independent interpretation of the statute, granting the agency's views the special consideration called for by Skidmore. For informal formats not carrying force of law, Chevron Step 2 should not be used at all.[301]

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[300] Id. at 527.

[301] An exception, for pre-enforcement review, is sketched in text at notes 182-187, supra.

Public Financial Disclosure by Federal Officials: A Functional Approach

THOMAS D. MORGAN*

For a generation or more, improving the ethical standards of government officials has been an important theme in American political rhetoric. The personal character of Presidential candidates, members of Congress, and other officials has been called into question. Lawyers see these issues translated into statutes, executive orders, legislative rules, and canons of judicial ethics that have been adopted in response to this concern.

The current focus on government ethics can make it easy to forget that comprehensive attempts to legislate the ethical behavior of federal officials are less than thirty years old. Indeed, the Ethics in Government Act,[1] the major governing legislation, was passed only eleven years ago in response to the Watergate scandal. However, responding to the continuing interest in ethics, one of President Bush's first official acts was to appoint a commission to evaluate existing legislation and to consider whether further changes should be proposed.[2]

This article examines one aspect of federal ethics legislation, the requirement that high executive branch officials make public financial disclosure of their income and assets. Financial disclosure illustrates the ratchet effect of ethics regulation, i.e., the view that one may add requirements but not correct excesses of the past. In this sense, they constitute a paradigm of both the possibilities and limitations of trying to enhance ethical sensitivity by using legislative mandates.

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[1] Pub. L. No. 95-521, 92 Stat. 1824 (1978).

[2] The President's Commission on Federal Ethics Law Reform was chaired by Judge Malcolm Wilkey. Griffin Bell was vice chairman. Members were Jan Baran, Judith Bello, Lloyd Cutler, Fred Fielding, Harrison Schmidt, and James Woolsey. Its report was entitled "To Serve with Honor: Report of the President's Commission on Federal Ethics Law Reform" (March 1989) [hereinafter TO SERVE WITH HONOR]. After no public hearings or debate, Congress attached major changes in federal ethics legislation to a pay raise bill passed in the waning hours of the first session of the 101st Congress (1989). References in this article to existing law are to the new legislation. *See* Ethics Reform Act of 1989 [hereinafter 1989 Ethics Act].

This article will argue that one needs to distinguish primary from secondary ethics regulations. Primary provisions are those designed to protect the government against real abuses, e.g., self-dealing, trading in government secrets, and influence peddling. Secondary provisions are those designed to help enforce the primary regulations. Financial disclosure properly fits into the secondary category. Failure to distinguish between the types, however, has led to the requirement of more disclosure than necessary.

I. A Brief History of Financial Disclosure Requirements

A. EARLY FEDERAL ETHICS LEGISLATION

During the first 175 years of United States history, ethical problems were probably at least as prevalent as they are today. In his Godkin lectures at Harvard in 1951, Senator Paul Douglas recalled that legendary Senator Daniel Webster was on retainer from the Second Bank of the United States during the debate over the renewal of its charter.[3] Abraham Lincoln himself, reports Douglas, "put men into positions where he knew they would enrich themselves" and "used dishonest men to corrupt others to obtain what we would consider beneficent ends."[4]

Before the Second World War, however, the only ethical issue other than outright bribery directly addressed by federal legislation involved the payment of claims after the Civil War. Private citizens had filed such claims for damage to or taking of propertly in the war effort. Some federal officials assisted citizens to pursue such claims and often were paid to do so. Concern that officials might misuse their federal positions to seek advantage for their friends or clients led, in 1864, to legislation against such assistance, whether or not undertaken for compensation.[5] The statutes were later amended, but largely to extend the prohibition to pressing claims involving matters on which a former official had worked while in government.[6]

United States v. Bergson[7] illustrates just how narrow the legislation was. A former lawyer in the antitrust division was indicted for seeking to get the Justice Department to issue two antitrust clearance letters in cases on which he had worked directly while at Justice. That violated the *Canons of Ethics*,[8] and would clearly be illegal today.[9] Thirty-five years ago, however, in light of the statutes' language and the narrow problem with which they were intended to deal, the District Court construed the phrase "claims against the government" to mean only "demands for money or property."[10] Thus, the indictment against Bergson was dismissed.

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[3] P. Douglas, Ethics in Government 15 (1952) [hereinafter Douglas].

[4] Douglas, *supra*, at 17 (citing Carl Sandburg).

[5] Act of June 11, 1864, ch. 119, 13 Stat. 123 (codified at 18 U.S.C. § 281 (1858)) (repealed 1962) (compensated assistance); An Act to Prevent Frauds Upon the Treasury of the United States, ch. 18, § 2, 10 Stat. 170 (1853) (codified at 18 U.S.C. § 283 (1858)) (repealed 1962) (uncompensated assistance).

[6] *See, e.g.*, Post Office Appropriations Act, ch. 256, § 5, 17 Stat. 202 (1872) (codified at 5 U.S.C. § 99 (1858)) (repealed 1962).

[7] 119 F. Supp. 459 (D.D.C. 1954).

In 1951, Senator Douglas conducted hearings aimed at a possible broadening of federal ethics legislation. In spite of his asserted view that ethical standards in the federal government were getting better rather than worse,[11] Douglas' subcommittee called for restrictions on providing gifts and entertainment to government officials, on the use of a public position to further one's private business, and on abuse by former government officials of contacts in their former agencies.[12]

In partial response to the Douglas subcommittee's call for action, a reluctant President Truman proposed that Congress pass ethics legislation that would require public financial disclosure by members of Congress and high level executive branch officials of their non-government income and sources of income such as real estate, securities, gifts and loans.[13] However, the legislation proposed by President Truman was not passed during his administration, nor during that of President Eisenhower.

B. THE BEGINNING OF NON-PUBLIC DISCLOSURE

While the modern attempt to try to legislate ethical conduct broadly is less than thirty years old, the use of public financial disclosure is a product of only the last fifteen years. As one of his first acts in office, President Kennedy appointed a distinguished Advisory Panel on Ethics and Conflict of Interest in Government. That panel, made up of Judge Calvert Magruder, Dean Jefferson Fordham, and Professor Bayless Manning, reported that ethics laws were neither coordinated nor comprehensive.[14]

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[8] American Bar Association Canons of Professional Ethics, Canon 36: "A lawyer,. . . having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such . . . employ."

[9] 18 U.S.C. § 207(a) (1990).

[10] *Bergson*, 119 F. Supp. at 468.

[11] Douglas, *supra* note 3, at 19.

[12] The problems are discussed in Douglas, *supra* note 3, at 45-58. The report of the Douglas subcommittee, "Proposals for Improvement of Ethical Standards in the Federal Government including Establishment of a Commission on Ethics," is discussed in R.N. Roberts, White House Ethics: The History of the Politics of Conflict of Interest Regulation 42-46 (1988) [hereinafter Roberts].

Senator Douglas was not the first to call for financial disclosure. Senator Wayne Morse had made such a call in 1946. *See* Senate Comm. on Governmental Affairs, S. Rep. No. 170, 95th Cong., 1st Sess. 23 (1977) (to accompany S. 555, the Ethics in Government Act of 1978) [hereinafter Senate Report].

[13] President's Special Message to Congress Recommending Conflict of Interest Legislation, 1951 Pub. Papers 540 (Sept. 27, 1951). *See also* Roberts, *supra* note 12, at 49.

The panel proposed legislation to President Kennedy which was adopted in 1962 and codified as 18 U.S.C. §§ 201-218.[15] These are still the principal provisions regulating the conduct of present and former Executive Branch officials and members of Congress. But, while the legislation prohibited government employees from "participating personally and substantially" on behalf of the government in any matter in which the employee "has a financial interest",[16] none of the provisions of this "comprehensive and coordinated" approach to government ethics made any mention of affirmative financial disclosure.[17]

A General Accounting Office investigation of contractor gifts to defense officials, and an accusation that a Commerce Department official had profited from stock transactions using inside information, helped convince the Johnson administration that action on ethics standards was required.[18] The first result was Executive Order 11,222, issued by President Johnson in 1965.[19] That Executive Order created the first requirement that federal officials report their financial interests for the record.

The program was relatively modest, reaching only "the head of each agency, each Presidential appointee in the Executive Office of the President who . . . [heads an agency] in that Office, and each full-time member of a committee, board, or commission appointed by the President".[20] Each covered official was required to report: (1) the names of all for-profit and nonprofit entities in which the official continued to serve as an employee, officer, owner, director, trustee, partner, adviser, or consultant, or in which the official had a continuing financial interest through the ownership of stock, a retirement plan, or the like, (2) the names of the official's creditors, other than the mortgagee on the official's home or a person owed money with respect to current living expenses, and (3) a list of the official's rights in real property other than the official's residence. The information was to be filed with the Director of the Civil Service Commission and was not to be made publicly available.

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[14] The conclusion was not surprising; it tracked closely the conclusion of a committee of the Association of the Bar of the City of New York for which Professor Manning had served as Reporter. *See* Special Committee on the Federal Conflict of Interest Laws, The Association of the Bar of the City of New York, Conflict of Interest and Federal Service (1960).

[15] Bribery, Graft and Conflicts of Interest Act, Pub. L. No. 87-849, 76 Stat. 1119 (1962) (codified at 18 U.S.C. §§ 201-213 (1982)). The Act is discussed in Perkins, *The New Federal Conflict of Interest Laws*, 76 Harv. L. Rev. 1113, 1113-17 (1963), and B. Manning, Federal Conflict of Interest Law 5-6 (1964).

[16] 18 U.S.C. § 208 (1982).

[17] The closest President Kennedy came to requiring financial disclosure was a program of confidential reporting which he initiated with respect to intermittent government employees. *See* Memorandum to Heads of Executive Departments and Agencies: Preventing Conflicts of Interest on the Part of Advisers and Consultants to the Government (Feb. 9, 1962).

[18] *See* Roberts, *supra* note 12, at 111-19 (describes the events preceding the issuance of President Johnson's Executive Order No. 11,222. 30 Fed. Reg. 6,469 (1965).

[19] Exec. Order No. 11,222, 30 Fed. Reg. 6,469 (1965) (prescribing standards of ethical conduct for government officers and employees).

[20] *See generally* Roberts, *supra* note 12, at 123-24 (about 200 officials were required to provide confidential reports pursuant to President Johnson's Executive Order, although more could have been subject to the order).

Allegations about misconduct by then-Congressman Adam Clayton Powell led Congress to require disclosure by its own members and top staff in 1968.[21] The rules were made applicable to all senators and representatives, announced candidates for the Senate, and high level legislative staff members. House and Senate rules were different, but they required disclosure of such things as ownership interests worth more than $5,000 in companies doing business with the government, sources of income over $1,000 per year, unsecured liabilities in excess of $10,000, and the identity of interests in real or personal property worth in excess of $10,000. Again, only a limited amount of the information was made publicly available.[22]

Judges were not included in the above rules, but in 1969 the Judicial Conference of the United States adopted a requirement that federal judges report quarterly any nonjudicial income they earned in excess of $100.[23] In 1972, when the American Bar Association adopted its *Code of Judicial Conduct*, Chief Justice Burger declared it applicable to all federal judges. That *Code* requires reporting all gifts and non-judicial income other than investments. In 1973, the Judicial Conference ordered that federal judges make those reports publicly available.[24]

C. THE LEGACY OF WATERGATE

Robert Roberts asserts that "[b]etween 1969 and August of 1973 the ethics program assembled during the Kennedy and Johnson administrations fell apart because of White House, Civil Service Commission, and agency neglect."[25] Although the Watergate hearings during 1973 and 1974 did not involve financial conflicts of interest, the ethical concern that Watergate raised created a mood generally receptive to a broad reform of government ethics laws.

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[21] *See* SENATE REPORT, *supra* note 12, at 23.

[22] H.R. DOC. NO. 402. 90th Cong. 2d Sess. 499 (Rule XLIV; "Financial Disclosure") (1969), and S. DOC. NO. 1, 91st Cong. 1st Sess. 60 (Rule XLIV; "Disclosure of Financial Interests') (1968). *See generally* SENATE REPORT, *supra* note 12, at 23 (discussing the events leading up to the adoption of these rules).

[23] JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 50-51 (1969). *See also* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6-9 (1970); JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 77 (1971).

[24] *See generally* SENATE REPORT, *supra* note 12, at 24 (discussing resolutions of the Judicial Conference of the United States and the American Bar Association regarding judicial conduct).

[25] ROBERTS, *supra* note 12, at 131.

Thus, in 1975 and 1976, the General Accounting Office selected eleven federal agencies in which to study the effectiveness of the existing financial disclosure system at revealing and preventing officials' conflicts of interests.[26] The study revealed that several apparent conflicts were either not identified or not corrected. Indeed, many employees had failed to file their financial disclosures at all.

The GAO findings, in turn, formed the basis of a report by Common Cause that helped solidify political support for significant new ethics legislation.[27] The principal concern identified by Common Cause was officials' excessive use of the revolving door, i.e., coming to government from the industry they regulated, leaving government for employment by regulated firms, or both. Officials' retention of interests in firms over which they had official responsibility was seen as part of this broader picture, and public financial disclosure was suggested as an important way to identify and prevent such conduct.[28]

The first fruits of this concern came in 1976 when the House and Senate imposed detailed requirements for the reporting of personal financial information on both their members and top staff. House and Senate rules again differed,[29] but together they required ten basic kinds of information:

1. The source and amount of earned income over $100 and honoraria of any amount;

2. The source, amount and date of gifts aggregating $100 or more from a single source, excluding gifts from relatives, personal hospitality, and gifts under $35;

3. The source, amount and date of gifts-in-kind aggregating $250 or more, with the same exclusions;

4. The source and amount of items of reimbursement aggregating $250 or more from any single source;

5. The source and category of value of each item of unearned income over $100 from any single source;

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[26] The eighteen individual agency studies are listed and the results summarized in U.S. GENERAL ACCOUNTING OFFICE, REPORT B-103987: ACTION NEEDED TO MAKE THE EXECUTIVE BRANCH FINANCIAL DISCLOSURE SYSTEM EFFECTIVE (Feb. 1977).

[27] A. KNEIER, SERVING TWO MASTERS: A COMMON CAUSE STUDY OF CONFLICTS OF INTEREST IN THE EXECUTIVE BRANCH (1976).

[28] *Id.* at 5-9. The period generally was one in which public disclosure was being prescribed for a variety of public ills. *See, e.g.*, The Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified as amended at 5 U.S.C. § 552 (1982)); The Government in the Sunshine Act, Pub. L. No. 94-904, 90 Stat. 1241 (1976) (codified as amended at 5 U.S.C. § 552(b) (1982)).

[29] The rules are set out in SENATE REPORT, *supra* note 12, at 25-26.

6. The identity and category of value of interests in property held for investment or production of income, which had a value in excess of $1,000;

7. The identity, category of value, and dates of transactions in securities, commodities or real property, which had a value in excess of $1,000;

8. The identity and category of value of personal liabilities which exceeded $2,500;

9. The identity of patent rights and agreements for future employment; and

10. The identity of positions held with private organizations.

D. THE ETHICS IN GOVERNMENT ACT OF 1978

The financial disclosure provisions of the Ethics in Government Act of 1978 were the culmination of these developments. Two basic arguments were made for the need for the new legislation.[30]

First, existing financial disclosure requirements were not uniform throughout government.[31] After adoption of its 1976 rules, Congress had imposed financial disclosure burdens on itself. It is not surprising that Congress then felt justified in imposing similar burdens on others.

Second, legislation was arguably needed because none of the statutory financial disclosure requirements then in place provided that the disclosures were to be publicly available. That argument assumed that public financial disclosure was desirable, a premise supported by the following four points.[32]

For one, public disclosure of financial information could serve to increase public confidence in government generally in the aftermath of Watergate. This argument, of course, was available to justify absolutely any legislation to which the "ethics" label could be applied.

Next, public financial disclosure arguably would show most public officials to be honest, thus benefitting both the public generally and the officials whose integrity would be made a matter of public record. In fact, neither before nor after the legislation has one seen a news story that "99.99% of federal officials are proved honest." In practical fact, this argument was also a makeweight.

Third, public financial disclosure was said to be necessary to deter people with unsavory financial pasts from even thinking about seeking public employment, thus preventing future financial scandals. Again, one cannot disagree with the objective, but it is not clear that people with "unsavory" pasts, apparent on the face of their confidential disclosure forms to Senate committees, for example, were being appointed and confirmed.

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[30] *See generally* SENATE REPORT, *supra* note 12, at 27-28 (explaining the perceived inadequacies of the financial disclosure requirements).

[31] Of course, that argument can always be made whenever laws differ as they frequently do. The concern for uniformity was also important to the Wilkey Commission. Its Recommendation 1 was that 18 U.S.C. § 208, which prohibits self-dealing, be extended to judicial and non-member legislative branch officials. Recommendation 17 called for uniform financial disclosure requirements among the three branches. TO SERVE WITH HONOR, *supra* note 2, at 12-16, 83-85.

[32] The arguments in various forms were made widely. *See, e.g.*, ROBERTS, *supra* note 12, at 140-44; REPORT OF THE COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES (1976).

Fourth, public financial disclosure was arguably necessary to deter self-dealing while in public service. Self-dealing was already a crime under 18 U.S.C. § 208, but the public availability of information could both increase the likelihood of catching wrongdoers and cause them to decide not even to take the chance of profiting from misconduct. In addition, it would provide a public check on waivers of insignificant conflicts permitted in § 208(b). This argument, described in this article as the "monitoring rationale," is the one on which public financial disclosure was ultimately meant to stand or fall.

II. THE PRESENT STATUTORY REQUIREMENTS

The Ethics in Government Act substantially achieved Congress' objective of uniform reporting requirements. Financial disclosure requirements for executive branch officials are very similar to those imposed on members of Congress and top legislative staff members,[33] as well as federal judges.[34] In working through the complex requirements, it is useful to distinguish three kinds of questions which are at the heart of any program of financial disclosure.

1. *Who* should be required to make financial disclosure? Should it be all political appointees? Should high level civil servants be included? Are there lower level employees who should also be required to report?

2. *What* information should be required? Should comprehensive financial information about the employee be required or only that which might suggest a conflict of interest? Should different information be required before confirmation than is required thereafter?

3. *How* should the requirements be enforced? Should supporting data be required of respondents? What sanctions should be available for failure to file a required report or an omission in such a report?

A. *WHO* IS REQUIRED TO MAKE DISCLOSURE?

Under the Ethics in Government Act, as amended in 1989, ten categories of government officers and employees are subject to disclosure requirements under 5 App. U.S.C. § 201.

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[33] 2 U.S.C. §§ 701-709 (1982 & Supp. V 1988).

[34] 28 U.S.C. app. §§ 301-308 (1982 & Supp. V 1988). The constitutionality of applying statutory disclosure standards to federal judges was upheld in Duplanter v. United States, 606 F.2d 654 (5th Cir. 1979), *cert. den.*, 449 U.S. 1076 (1981).

1. Each person nominated for a position, appointment to which required the advice and consent of the Senate;[35]

2. Each officer and employee of the executive branch (including a special employee who is expected to work more than 60 days in a year) whose position is classified GS-16 or above (the Senior Executive Service), or who is paid at a level higher than the minimum rate paid a GS-16;[36]

3. Each member of a uniformed service whose pay grade is at or in excess of 0-7 (brigadier general and above);[37]

4. Each employee determined by the Office of Government Ethics to be of a classification equal to 2 & 3, above;[38]

5. Each administrative law judge;[39]

6. The Postmaster General, Governors of the Postal Service, and all other Postal Service and Postal Rate Commission employees whose rate of pay exceeds the minimum for GS-16;[40]

7. Each person excepted from competitive civil service appointment because the person's job is deemed to be of a confidential or policy-making character, unless the person is excused from the reporting requirement by the Director of the Office of Government Ethics on the ground such exclusion would not affect the integrity of the government;[41]

8. The President and Vice President, and each person who becomes a candidate for those offices;[42]

9. The Director of the Office of Government Ethics and each designated agency ethics official;[43]

10. Any civilian employed in the Executive Office of the President who holds a commission of appointment from the President.[44]

That list includes more than 5000 people.[45] In addition, the Ethics in Government Act was amended in 1985 to make yet more people potentially subject to reporting.[46] Under the amended provision, the President is now authorized to require confidential financial disclosure reports of such other "officers and employees in the executive branch" as the President may prescribe.[47]

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[35] 5 U.S.C. app. § 201(b)(1) (1982 & Supp. V 1988). The 1989 legislation will move these requirements to parallel provisions of Title 2, U.S.C. Because the precise citations are not available as this article goes to press, citations to 5 U.S.C. app. are retained throughout this article.

[36] *Id.* § 201(d), (f)(3).

[37] *Id.* § 201(f)(3) (1982).

[38] *Id.*

[39] *Id.* § 201(f)(4).

[40] *Id.* § 201(f)(6).

[41] *Id.* § 201(f)(5).

[42] *Id.* § 201(c), (f)(1)-(2).

[43] *Id.* § 201(f)(7).

[44] *Id.* § 201(f)(8) (as amended in 1989).

[45] Subsection (h) of 5 U.S.C. app. § 201 confers authority on Designated Agency Ethics Officials to exempt persons who are expected to work less than 60 days in a calender year from the reporting requirements. Subsection (i) gives similar authority to the Director of the Office of Gov-

B. *WHAT* INFORMATION IS REQUIRED?

The information required from each of these people by 5 App. U.S.C. § 202 is very extensive. The ten categories into which the information falls are clearly based on the categories of information required in the 1976 rules of the House and Senate. Each respondent today must describe:

1. The identity and value if it exceeded $1,000 at the close of the preceding calendar year (reported in one of seven categories — under $15,000, $15,000 to $50,000, $50,000 to $100,000, $100,000 to $250,000, $250,000 to $500,000, $500,000 to $1 million and over $1 million) of any interest in a trade or business or asset held for investment or production of income by the reporting individual, excluding both debts owed to the official by a relative and personal savings accounts which aggregate less than $5,000;[48]

2. The identity and value (using the categories in number 1, above) of liabilities in excess of $10,000 owed by the reporting official to anyone other than a spouse, parent, grandparent, brother, sister or child of the reporting individual or of the reporting individual's spouse (but excluding the individual's home mortgage, all loans secured by personal property not in excess of the purchase price of the items which secure it, and all revolving charge accounts with individual balances under $10,000 at the close of the preceding calendar year);[49]

3. The date, parties to, and terms of any future employment arrangements negotiated by the reporting individual, any leave of absence during the period of federal service, continuing payments from a former employer, or continuing participation in a former employer's welfare or benefit plan;[50]

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ernment Ethics when the government employee is expected to work less than 130 days and the position is unlikely to involve a conflict of interest.

[46] Ethics in Government Act Amendments of 1985, Pub. L. No. 99-190, § 148(b), 99 Stat. 1325 (1985). The amendments were also designed in part to make clear that persons required to make confidential disclosure need not be required to disclose the same things required in public disclosure. Further amendments to the confidential disclosure provisions were made by the 1989 Act.

[47] In response to this grant of authority, President Reagan has issued Executive Order 12,565, (Sept. 26, 1986), 3 C.F.R. 229 (1987). The Office of Government Ethics has proposed to further codify the requirement. 51 Fed. Reg. 43,359 (1986) (to be codified at 5 C.F.R. pt. 735) (proposed Dec. 2, 1986). However, President Bush superseded the executive order by issuing "Principles of Ethical Conduct for Government Officers and Employees." Exec. Order No. 12,674, 54 Fed. Reg. 15,159 (1989).

[48] 5 U.S.C. app. § 202(a)(3), (d) (1982) (as amended in 1989).

[49] *Id.* § 202(a)(4) (as amended in 1989).

[50] *Id.* § 202(a)(7).

4. The source of all compensation in excess of $5,000 received by the reporting individual in the two years prior to the individual's becoming a federal official, and a brief description of the services for which the compensation was paid. It is of particular interest to lawyers entering government service that disclosure under this provision is not required with respect to legally privileged information or "with respect to any person for whom services were provided by any firm or association of which [the reporting] individual was a member partner or employee unless such individual was directly involved in the provision of such services;"[51]

5. The source, type and amount of non-governmental earned income, including honoraria, which in the aggregate exceed $200, received by the reporting individual in the preceding calendar year, and, effective 1991, all gifts made to charity in lieu of honoraria;[52]

6. The date, a brief description, and the value if over $1,000 (using the categories in number 1, above) of each purchase, sale or exchange of real property, stock or other securities during the preceding calendar year, except transactions between the reporting individual and a spouse or children;[53]

7. All positions the reporting individual has held during the two years before appointment (and annually thereafter) as a more-than-honorary officer, director, trustee, partner, proprietor, representative, employee, or consultant in any for-profit or non-profit organization (other than a religious, social, fraternal, or political entity);[54]

8. The source, value and a brief description of all gifts to the reporting individual from any source which exceed $200 in aggregate value over the preceding year, excluding gifts from relatives and "personal hospitality of an individual";[55]

9. The source and a brief description of reimbursements aggregating in excess of $200 received by the reporting individual from any source in the preceding calendar year (i.e., whether or not from a relative and with no de minimis figure);[56]

10. The source and type of all dividends, rents, interest, and capital gains in excess of $200 in the preceding calendar year, with amounts of each reported in one of seven categories, namely, below $1,000, $1,000 to $2,500, $2,500 to $5.000, $5,000 to $15,000, $15,000 to $50,000, $50,000 to $100,000, $100,000 to $1 million and over $1 million.[57]

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[51] *Id.* § 202(a)(6)(B).

[52] *Id.* § 202(a)(1)(A) (as amended in 1989).

[53] *Id.* § 202(a)(5).

[54] *Id.* § 202(a)(6)(A).

[55] *Id.* § 202(a)(2)(A) (as amended in 1989).

[56] *Id.* § 202(a)(2)(B) (as amended in 1989).

[57] *Id.* § 202(a)(1)(B) (as amended in 1989).

The official is also required to report most of the above information as it relates to his or her spouse and dependent children. Except for things such as gifts received completely independent of the spouse's relationship to the official, property interests of a child which were not in any way obtained from assets or activities of the official, and interests of a spouse living separate and apart with an intention of terminating the marriage, the reporting must be thorough and comprehensive.[58]

C. *HOW* ARE THE REQUIREMENTS ENFORCED?

Enforcement responsibility for the financial disclosure provisions is widely distributed. Filing and availability of reports are the subject of 5 App. U.S.C. §§ 203 and 205. Most individuals are required to submit their financial disclosure form to the designated ethics official for their agency.

Nominees who require Senate confirmation also file with the Director of the Office of Government Ethics. The Director then transmits the report to the Senate committee. Nominees also report whatever other information on other forms may be required by the Senate committee with jurisdiction over the nomination.[59]

Within 15 days of receiving the report, it must be made available for public inspection along with the official position description for the office the individual holds. Exceptions to this requirement are made only for persons engaged in intelligence activities whose identification would compromise the national interest.[60] All such reports are available for both inspection and copying by any person upon disclosure of the person's identity, address, occupation, and any organization for which the information is being obtained. The information may not be used to establish a credit rating or for any purpose which is illegal or commercial or connected with a political or charitable solicitation.[61]

In most cases, the statute requires that, within 60 days of the filing of each report, the form be reviewed by the agency's "designated ethics official." In some cases, review is by the Director of the Office of Government Ethics.[62] If the reviewing official believes that more information is required, that information is requested and supplied. If the reviewing official concludes that the financial disclosure shows the individual not to be in compliance with applicable laws and regulations, the person is given an opportunity to conform.

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[58] *Id.* §§ 202(e), (f). Pursuant to § 207 of the Act, as amended, the President may require officers and employees in the executive branch to submit, on a confidential basis, such additional information as the President may direct. 5 U.S.C. app. § 207 (1982).

[59] 5 U.S.C. app. § 202(c) (1982 & Supp. V 1987).

[60] *Id.* § 205(a).

[61] *Id.* § 205(b)(2), (c).

[62] *Id.* § 206(a).

Most often, the person will have to sell an asset which creates a conflict, create a blind trust into which his or her assets may be put, give back income or a gift properly received, request an exemption from one or more requirements of the act, or request a transfer, reassignment, or limitation of duties. If none of these will eliminate the problem, the individual will have to refuse the appointment or, if already in office, resign.[63]

Under § 204 of the Act, the Attorney General has authority to prosecute willful falsification of, or failure to file, a required report. The action brought is a civil action and the court may assess a civil penalty not to exceed $10,000 for each violation.[64] In addition, the section provides that any "appropriate personnel or other action" may be taken against the offender by the head of the agency and Office of Personnel Management which is consistent "with applicable law or regulation."[65]

III. THE NEXT ROUND OF ETHICS LEGISLATION

President Bush took office in January 1989 pledging to make ethics a top priority in his administration.[66] As President Kennedy had done 28 years earlier, the President appointed a distinguished commission and directed it to make legislative proposals that he could submit to Congress.

The Bush commission considered recommendations from both agencies and individuals. With respect to financial disclosure, both the Office of Government Ethics[67] and a committee of the Administrative Conference of the United States[68] suggested that the requirements be made less detailed and more related to functional objectives.

Common Cause, on the other hand, took a strong public position against any change because of fear of weakening current requirements.[69] The commission's final report, issued in less than six weeks, called for some increase in financial disclosure.[70]

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[63] *Id.* § 206(b). The blind trust remedy is discussed at length in § 202(f)(2), (7).

[64] *Id.* § 204(a) (as amended in 1989). The Justice Department has brought at least four such suits since 1978. U.S. Department of Justice, News Release, September 29, 1988.

[65] 5 U.S.C. app. § 204(c) (1982 & Supp. V 1987).

[66] Indeed, a concern about ethics had been a part of his campaign. *E.g.*, Speech to Congressional Interns (July 26, 1988), *reprinted in* 134 CONG. REC. S9840-41 (daily ed. July 26, 1988).

[67] Letter from Frank Q. Nebeker, Director of the Office for Government Ethics, to Chairman Wilkey (Feb. 10, 1989). The 49-page letter was detailed, and with respect to financial disclosure, it called for fewer general statutory requirements and more discretion in the Office of Government Ethics to tailor requirements to the circumstances of particular government positions.

[68] An earlier version of this article was sent to the Commission by the Committee on Government Ethics. In addition, two members of the Committee, Lloyd Cutler and Fred Fielding, were also members of the Commission.

[69] *Compare Bush's Panel Favors Easing Ethics Rules: Financial Disclosure Would be Curtailed*, Washington Post, Feb. 21, 1989, at 1, col. 1, *with Ethics Panel Tentatively Backs Honoraria Ban in Top Jobs*, Washington Post, Feb. 23, 1989, at 1, col. 1 (reporting Common Cause reaction to the first story and the resulting changes in the Commission's tentative position).

First, the commission recommended raising the highest category in which assets would be required to be reported from $250,000 to $1 million in order to identify very large interests, and the top category of income reported from $100,000 to $250,000.[71]

Second, the commission recommended requiring disclosure of the amounts and holders of political appointees' home mortgages.[72] These are typically the largest liabilities of government officials, the commission reasoned, so there was no reason to exempt them from disclosure.

Third, the commission recommended requiring disclosure of all liabilities owed by political appointees to their relatives other than their spouse, children, parents, and siblings.[73] The mere fact that a creditor is distantly related to the official, the commission argued, does not eliminate the possibility of being pressured into acting improperly.

After review, President Bush proposed legislation which went even beyond the commission's recommendations.[74] The resulting legislation, the Government Ethics Reform Act of 1989, was passed, after no public hearings, as part of the Congressional salary increase package in the last day of the first session of the 101st Congress.[75] What makes ethics regulation seem to move only in the direction of greater restriction? How should one suggest the direction of future changes in financial disclosure requirements?

One might argue that more disclosure is always better than less. After all, people who are hesitant about making financial disclosures must inevitably have something to hide. However, when one is talking about ethics legislation, executive orders and the like, one is talking about a form of public regulation. People may differ about how to measure the costs and benefits of this regulation, but it is undeniable that there are costs involved. The costs are of at least two types.

First is the practical burden faced by an individual who must assemble and report information accurately. That is, in evaluating a disclosure requirement one should ask whether a nominee or employee would reasonably be expected to have at hand the information which he or she is required to report.

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[70] To SERVE WITH HONOR, *supra* note 2, Recommendation 16, at 79.

[71] *Id.* at 81.

[72] *Id.*

[73] *Id.*

[74] The proposed law was called the "Government Wide Ethics Act of 1989." S. 765, 101st Cong., 1st Sess., 135 Cong. Rec. S3,760 (1989). A comparable bill was introduced in the House of Representatives. H.R. 2337, 101st Cong., 1st Sess. (1989). On the same day, April 12, 1989, President Bush issued Executive Order 12,674 which imposed additional ethics restrictions on executive branch officials. *See* Exec. Order No. 12,674, 54 Fed. Reg. 15,159 (1989).

[75] 1989 ETHICS ACT, *supra* note 72, at § 201(f)(10).

Second is the psychological burden imposed on an individual who must make his or her financial status publicly available to others. The person may have something to hide, but often will not. The question to ask should be whether a reasonable person would consider the questions to be an excessive invasion of privacy given the value of the information in terms of the purpose to by served by it.[76]

There is little question that the costs are real and burdensome. They are borne first by individuals, but ultimately by the nation as people decide whether or not to take positions in government. A nationwide Academy of Public Administration survey of post-1978 appointees to high federal positions, for example, found that more than 30% had great difficulty or very great difficulty filling out their disclosure forms. This compared to less than 10% reporting difficulty before 1978.[77]

Both the National Academy of Public Administration[78] and the Office of Government Ethics[79] also report that these burdens have deterred a significant number of good people from accepting federal positions. Given a political climate in which even inadvertent omission of some piece of required information could lead to charges of "unethical conduct," such deterrence is not surprising.

The potential countervailing benefit from financial disclosure, however, is real. Monitoring the behavior of agents is a problem in almost any organization. Corporations face the challenge, for example, of assuring that their managers are not stealing corporate assets or business opportunities. Members of labor unions need assurance that their officers are working to serve the members and not themselves. The problem of monitoring government officials is not unlike such problems in the private sector. It is, however, made more difficult by the numbers of officials who might violate their trust and the relative lack of control that voters have over their elected representatives, much less over employees of the executive branch.

Financial disclosure should not be seen as an end in itself. It serves both as an enforcement mechanism for, and as a way of calling attention to 18 U.S.C. § 208, the basic criminal statute prohibiting self-dealing. In principle, public financial disclosure by federal officials makes it possible to monitor financial incentives faced by those officials and the extent to which they may have profited from official action.

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[76] This privacy argument is heard less often today, but it was of such concern in the 1960's that the original policy of confidential financial disclosure was almost stillborn. *See* ROBERTS, *supra* note 12, at 124-26. Indeed, the privacy concern was what kept public disclosure requirements limited to a relatively small number of high-level officials.

[77] NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, LEADERSHIP IN JEOPARDY: THE FRAYING OF THE PRESIDENTIAL APPOINTMENTS SYSTEM 14 (1985).

[78] *Id. See also* THE IN-AND-OUTERS 83-88 (G. Mackenzie ed. 1985) (discussing the effect of the Ethics in Government Act on presidential appointees).

[79] Walter, *The Ethics in Government Act, Conflict of Interest Laws and Presidential Recruiting*, 1981 PUBLIC ADMINISTRATION REVIEW 659 (at the time the article was written, Walter was Director of the Office of Government Ethics).

It is a mistake to use financial disclosure to go beyond the task of disciplining self-dealing and to try to assure the basic integrity of government officials. No one can oppose honesty in government, but financial disclosure is unlikely to have much effect on making officials better people. Indeed, attempting to assure fundamental integrity by use of financial disclosure is the functional equivalent of the character and fitness investigations of state bar applicants. The difficulties and abuses inherent in such inquiries are well documented.[80]

The monitoring function of financial disclosure may produce benefits, but increased disclosure is not necessarily better than less. The challenge is to develop disclosure obligations that both maximize the relevance to self-dealing of the information sought and minimize the burdens on the persons supplying it.

IV. A MONITORING MODEL OF FINANCIAL DISCLOSURE

If the purpose of financial disclosure is monitoring official misconduct, present disclosure requirements could be reduced without appreciable loss of effectiveness. Indeed, creating a mechanism for auditing the completeness and accuracy of the information already obtained would be more likely to raise the level of ethical behavior than would asking for more information. The following recommendations do not retreat from concerns about ethical conduct, but they examine the function of present disclosure standards from a monitoring perspective.

RECOMMENDATION ONE

A. The following categories of persons should continue to be presumed required to make public financial disclosure:

(1) The President, Vice President, and nominees for and incumbents in positions which require Senate confirmation;

(2) Full-time officers and employees of the executive branch (including independent agencies) whose positions are classified as GS-16 or above or who are paid at or above the minimum rate of pay for GS-16. To be consistent, the requirements should be extended to (1) each member of a uniformed service whose pay grade is at or in excess of 0-7; (2) the Postmaster General, Deputy Postmaster General, each Governor of the United States Postal Ser-

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[80] *See, e.g.*, Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985); McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67 (1984).

vice, and each Postal Service and Postal Rate Commission employee or officer whose rate of pay equals or exceeds the minimum rate of basic pay for GS-16; (3) each Administrative Law Judge whose rate of pay equals or exceeds the basic pay for GS-16; and (4) all other employees determined by the Director of the Office of Government Ethics to be in positions equal in responsibility to those normally classified at GS-16 or above.

B. Congress should amend the Ethics in Government Act to permit the Director of the Office of Government Ethics:

(1) To extend the reporting requirement, on a position or categorical basis, to any officer, employee, or special government employee of the executive branch not covered by the act, whose position is determined by the Director to present an unusual opportunity for conflict of interest; and

(2) To exempt from the reporting requirement those positions otherwise subject to the requirement whose responsibilities are identified by their agencies and determined by the Director to be unlikely to place their incumbents in situations of conflict of interest.

Government officials required to make financial disclosure should be those who are most likely to have conflicts of interest prohibited by 18 U.S.C. § 208. As discussed above, the Ethics in Government Act now identifies ten categories of individuals who are required to submit financial disclosure forms. Recommendation One combines several categories and eliminates others, but its basic effect would be to give the Office of Government Ethics authority to evaluate whether or not a particular job or job category requires coverage.[81]

The President and Vice President are covered by this recommendation primarily for the symbolic value of holding them to the same standards required of subordinate officials. Presidential and vice presidential violations of conflict of interest laws are unlikely to be discovered through their financial disclosure forms; conversely, including them in coverage is not likely to discourage candidates for the offices.

Nominees for positions which require Senate confirmation are the persons who most clearly should be required to make financial disclosure. They are most likely to be coming into government from outside, most to return to the private sector, and most likely to have accumulated assets or personal interests which could be served improperly while in government service.

Furthermore, each such nominee must face a Senate committee. The committee will want to know of possible financial conflicts, so the burden of filing under the Ethics in Government Act is unlikely to be an added burden. The requirements of the Act should be coordinated as nearly as possible with those of Senate committees, but the basic reporting requirement is appropriate.

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[81] The proposals in this report are directed only at appointments to executive departments and independent agencies. Congress' original objective of having parallel ethics legislation for all three branches of government was highly desirable, however, and the approach used in this report should be taken with respect to legislative and judicial financial disclosure as well.

The application of financial disclosure requirements to career civil servants and military officers reaches both more people and more situations. By no means all appointees to positions paid at a rate for GS-16 or above are persons who come into government through the revolving door, and there is normally little public curiosity about the financial dealings of people who are not in the public eye. On the other hand, career officials certainly can have accumulated assets over their careers which would create conflicts of interest. Likewise, many career officials have plans and aspirations to work in the private sector after government service. Further, it is often true that career officials hold some of the most powerful positions in the government in terms of ability to favor one interest over another. The ability to award a contract worth millions of dollars, for example, may reside in someone subordinate to the officials who require Senate confirmation. Thus, presumptive coverage of all such jobs and their incumbents is appropriate.[82]

Similarly, the Ethics in Government Act properly requires disclosure by many Administrative Law Judges (ALJs). They are not now covered by the parallel provisions which apply to Article III judges,[83] yet the same concerns about litigants knowing the interests of such judges may be present. However, not all ALJs are alike in this regard. ALJ's who hear Social Security Disability cases for the Department of Health and Human Services, for example, do important work but would rarely have a disqualifying conflict. Furthermore, applicants for Social Security benefits are unlikely to peruse a financial disclosure form before their claims are heard. In short, financial disclosure of financial interests may be appropriate for some kinds of Administrative Law Judges but not others. Fortunately, the line between ALJs who hear large volumes of routine cases and those with more traditional functions tends to be drawn between judges paid above or below grade GS-16, so the general distinctions work here as well.[84]

Finally, there is no reason to treat Postal Service officials differently. The risk of self-dealing is certainly present given the significant value of contracts which the Postal Service has the power to award. Technical independence of the Postal Service should not change the approach to the ethics issues presented.

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[82] The Director of the Office of Government Ethics would continue to be covered under Recommendation One because the director is now paid at Executive Salary Level III, 5 U.S.C. § 5314. *See* Pub. L. No. 100-598, 102 Stat. 3031 (1988).

[83] 28 U.S.C. app. §§ 301-308 (1982).

[84] *See generally* Lubbers, *Federal Agency Adjudications: Trying to See the Forest and the Trees*, 31 FED. BAR NEWS & J. 383 (1984). Presently, the Ethics in Government Act covers all Administrative Law Judges. Thus this proposal would change present law by excluding from coverage all who are paid below grade GS-16.

The recommendation also suggests, however, that coverage of many civil servants and military officers could better be handled by focusing on the character of the position rather than exclusively on the pay grade of the incumbent as the act now does. To be sure, senior civil servants and military officers all have important positions, but many are more subject to conflicts of interests than others. If the Director of the Office of Government Ethics were given the power to exempt some positions held by these officials from coverage of the act, just as the Director now may do with respect to confidential assistants,[85] the presumption in favor of coverage would remain, but the burden of disclosure could be minimized where it does not produce commensurate benefits. Recommendation One so proposes.

On the other hand, not all power which is subject to abuse resides in officials with pay grades of GS-16, O-7, and above. Recommendation One thus also proposes giving the Director authority to extend the requirements of the act to civil servants and military officers below the grades of GS-16 and O-7 who occupy positions that present an unusual risk and opportunity of self-dealing.[86] Decisions to add or delete positions from required financial disclosure under the act should be made only after public notice and opportunity for comment. The decisions should be subject to judicial review.

The same substantive and procedural approach also should be applied to determine whether particular special government employees should be required to make financial disclosure.[87] Such positions cover an extremely wide range of activities, perhaps including even members of advisory committees that meet only intermittently.[88] That such employees should have different treatment has long been recognized. Exactly what the treatment should be should be resolved in each case by the Office of Government Ethics.

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[85] 5 U.S.C. app. § 201(f)(5) (1982).

[86] The authority given the President to add to the list of persons required to file confidential reports, and the President's authority to require less information from some such persons, are steps in the right direction. *See supra* note 42 and accompanying text.

[87] The term "special government employee" was created by President Kennedy's 1962 legislation, Pub. L. No. 87-849, § 202, 76 Stat. 1121, to distinguish part-time employees from full-time employees for purposes of the ethics laws. The term is currently defined in 18 U.S.C. § 202 (1982).

[88] A report to the Administrative Conference of the United States discusses the extent to which ethics legislation should cover positions created by the Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-15 (1972). Berg, *Conflict of Interest Requirements for Members of Federal Advisory Committees* (1989). The report was the basis for Administrative Conference Recommendation 89-3, 1 C.F.R. § 305.89-3 (1990).

RECOMMENDATION TWO

A. Congress should continue to require both *incumbent* executive branch officers and employees whose positions are covered by the Ethics in Government Act, *and nominees* for those positions, to disclose publicly:

(1) The date, parties to, and terms of any future employment arrangements negotiated by the reporting individual, leaves of absence during the period of federal service, continuing payments from a former employer, or continuing participation in a former employer's welfare or benefit plan; and

(2) The identity of all positions held by the reporting individual as an officer, director, trustee, partner, proprietor, representative, employee or consultant of any corporation, company, firm partnership, or other business enterprise, any non-profit organization, any labor organization, or any educational or other institution other than the United States, but not including positions held in religious, social, fraternal, or political entities, or positions solely of an honorary nature.

B. In addition to the information required to be reported under A above, Congress should continue to require that *nominees* for positions for which disclosure is required under the Ethics in Government Act report the source of all compensation in excess of $5,000 received by the reporting individual from one source in the two years preceding the one in which the nominee files, and a brief description of the services for which the compensation was paid.[89]

C. In addition to the information required to be reported under A above, Congress should continue to require covered *incumbent* executive branch officers and employees to disclose:

(1) The source, type, and amount of non-governmental earned income received by the reporting individual, including honoraria, which in the aggregate exceeded $200; and

(2) The date and a brief description of each purchase, sale, or exchange of real property with a value over $1,000, except (i) transactions between the reporting individual and a spouse or children, (ii) transactions involving a personal residence of the reporting individual or the individual's spouse, and (iii) transactions involving an investment in the nature of a case equivalent (e.g., a money market fund, certificate of deposit, or personal bank account).

D. Congress should amend the current requirements with respect to the following additional items to require incumbent officials to disclose:

(1) The identity of any interest in a trade or business or asset held for

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[89] As current law provides, this requirement should not apply to information about any person for whom services were provided by the firm or association of which the nominee was a member, partner, or employee, unless the nominee was directly involved in the provision of such services.

investment or production of income, if the value of the interest exceeds $1,000; and

(2) The identity of liabilities in excess of $1,000 owed by the reporting official, other than the official's home mortgage, loans for the purchase of personal property which are secured by the property purchased, sums owed to a relative, and revolving charge accounts; and

(3) The source and a brief description of any gifts of transportation, lodging, food or entertainment, or any reimbursements for same, with a value in excess of $250 per event, received by the reporting individual from any source other than a relative in the preceding calendar year; and

(4) The source, value, and a brief description of all other gifts to the reporting individual from any source which exceed $100 in aggregate value over the preceding year, again excluding gifts from relatives.

The present requirement for reporting arrangements for leaves of absence, future employment arrangements, and the like, is certainly proper. Concerns about the revolving door have always been at least in the background of issues of financial disclosures.[90] Interests in future employment are exactly the kinds of interests that could affect decisions while in office, and indeed they were subjects of reporting in even early programs such as Executive Order 11,222.

Likewise, continued reporting of leadership positions in for-profit and not-for-profit organizations provides a way to monitor fiduciary duties which the employee has that might conflict with the employee's official duties. One must be careful that any such reporting have minimal effects on the employee's rights of free association, but the report's limitation to leadership positions and the law's complete exclusion of social, religious, and political organizations seem to achieve that purpose.

The present requirement to report the sources of all income over $5,000 for a full year before the official comes into government constitutes a relatively nonburdensome way to suggest possible sources of influence over the official. Further, it is important to know the amount of non-governmental income earned by persons currently in government. Requiring such annual disclosure helps assure that they are not violating 18 U.S.C. § 209, which prohibits augmenting one's government salary, or worse, taking money from a person or organization with an interest that is in conflict with his or her official responsibility. But this recommendation would eliminate the current requirement of disclosure of all sources of non-governmental earned income over $100 for the year *before* a person entered government as far more detailed than necessary to monitor real conflicts of interest.[91]

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[90] *See* A. KNEIER, *supra* note 27.

[91] 5 U.S.C. app. § 202(a)(1)(A) (1982).

It is similarly important to report transactions in real estate and securities so as to negate the possibility that the official has acted using information acquired as a government official. However, the recommendation suggests excepting transactions within the family, and purchases and sales of shares in money market funds or other instruments which have the characteristics of cash rather than equity or longer-term debt because they are unlikely to implicate government interests.[92]

The report of business interests and assets held for investment or production of income is likewise basic to the recognition of potential conflicts of interest and the structuring of remedies with which to avoid them. The minimum $1,000 value presently in the act is a good figure to avoid the reporting of de minimis interests.[93]

Unlike the present statute, however, this recommendation would not require reporting valuation of the assets, even by categories, if the value exceeds $1,000. Valuation of assets can be a major problem. Pieces of real property that have not been sold in many years, shares of stock in a family corporation, and the like, are often impossible to value precisely. Even the category of value into which they fall may be unclear if the categories are drawn as narrowly as they are under the present act. Further, once a conflict-creating interest exists, the conflict is not technically of greater or lesser magnitude depending on the size of the interest. All that is left is a general curiosity about the extent of public personalities' wealth.[94]

The identity and value of liabilities are also appropriate for disclosure. Incentives for wrongdoing are not always created by the desire to get rich. Financial pressures can also be caused by a debt burden which is too large to carry on a government salary. Indeed, the real criticism of the present act on this point is that the threshold is too high. If each asset worth over $1,000 must be reported, reporting of debts should not begin at $10,000. A reduction of the debt threshold to the same $1,000 figure as for assets would give a more accurate sense of the financial picture of the reporting official. The suggested exemption of routine personal debts which present little possibility for conflict will minimize intrusiveness and simplify the task of both the reporting and reviewing officials.

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[92] Instruction I.A. to Schedule B of Form SF 278 (the current financial reporting instrument) so provides today.

[93] In state laws which require disclosure by judges, the typical triggering amounts are $1,000 or a 10% interest in the enterprise. Rosenbaum & Lubet, *Financial Disclosure by Judges: Functional Analysis and Critique*, 40 U. FLA. L. REV. 241, 284-87 (1988).

[94] A contrary view was taken by Ann McBride of Common Cause in an Administrative Conference working conference on ethics issues in March 1988. McBride argued that valuations are necessary in order to determine the likely relative importance to the official of particular investments in his or her portfolio. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK OF GOVERNMENT ETHICS FOR PRESIDENTIAL APPOINTEES 32 (Dec., 1988) (statements of Ann McBride).

The recommendation that an official report all gifts over $100, all entertainment over $250 per event, and reimbursements over $250 per event represent somewhat higher figures than in the present law in order to avoid situations where ordinary hospitality might be just below or just above reporting requirements. The basic obligation, however, is clear, easily applied, and its purpose is self-explanatory.

RECOMMENDATION THREE

A. The requirements of the Ethics in Government Act should continue to be enforced, in the first instance, by the agencies' designated ethics officers, the Office of Government Ethics, and the relevant Senate committees in confirmation proceedings. Ultimate enforcement authority of the Attorney General, however, should be retained.

B. In addition, a system of periodic random audits should be created to verify compliance with disclosure requirements and the avoidance of conflicts of interest.

Public financial disclosure plays an important part in allowing the monitoring of official conduct. Moreover, reducing some of the scope and content of that disclosure as suggested in this report should eliminate much of the intrusiveness that leads to objections of some officials to public disclosure today.

In the first instance, the reports should be made to the agencies' designated ethics officers, the Office of Government Ethics, and the relevant Senate committee in a confirmation proceeding. The Attorney General should have the right and duty to prosecute knowing omissions or failures to file, but presumably those should be rare.[95]

There is, however, a schizophrenia reflected in the present financial disclosure provisions of the Ethics in Government Act. Officials are required to supply large amounts of very detailed information on an annual basis, but after initial confirmation, little effort is made either to verify its accuracy or its completeness. Nor is significant attention directed at any continuing assessment of the conflict of interest implications of what officials have reported.

Random audits of such forms might do much to cause the requirements of disclosure to be taken seriously. The audit need not be intrusive. In the first instance, it could take the form of requesting the official's income tax form for the year in question and comparing the information with that in the disclosure form. As for assets that are not directly reported on a tax form, the income from the assets would be shown. If there were income reported for which no reported assets corresponded, for example, a problem may be present.

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[95] *See generally* GENERAL ACCOUNTING OFFICE, ETHICS ENFORCEMENT: PROCESS BY WHICH CONFLICTS OF INTEREST ALLEGATIONS ARE INVESTIGATED AND RESOLVED (1987); GENERAL ACCOUNTING OFFICE, ETHICS ENFORCEMENT: RESULTS OF CONFLICT OF INTEREST INVESTIGATIONS (1988).

A second line of inquiry might be a financial statement filed by the official with a bank in order to get a home mortgage. Again, the effort would be to determine the consistency of the statements. An official committing fraud in all of his or her activities might escape detection, but errors would be caught and care would be encouraged.

The audits should be done by the Office of Government Ethics, i.e., someone outside the official's own agency. Doing as few as 10% of the reports each year, selected at random, would seem likely to accomplish the deterrence objective. Clearly, if willful non-disclosure is discovered or if remedial steps need to be taken to avoid conflicts, the procedures currently in the Act should be followed.

Given the number of officials involved and the potential intrusiveness of trying to verify the absence of hidden assets, a lack of perfect enforcement is inevitable. An effort to move in the direction of verification, however, not in the direction of more disclosure, would be a far better investment of effort and resources.

V. Financial Disclosure for Reasons Other than Monitoring

Financial disclosure gets out of hand when its secondary or enforcement purpose is confused with a primary purpose, i.e., when disclosure is thought to be valuable in its own right. While the argument is rarely articulated, it seems to be that people who are candid about their financial affairs will be candid in discharge of their public responsibilities. Indeed, it is seemingly implied that they will then also be people of good judgement, empathy, and social concern. Stating the arguments in this way suggests their inherent weakness, but a brief look at current and proposed requirements which perform no monitoring function will illustrate how requirements can proliferate.

A. PERSONS REQUIRED TO MAKE DISCLOSURE

At least three groups of people are required to make financial disclosure today when the reasons for their being required to do so are obscure.

Candidates for president and vice president, for example, are required to make financial disclosure.[96] Disclosure of their personal finances might satisfy public curiosity, but it would serve no other function. Concern about disclosure by major party candidates should not be great; they will be forced to make "voluntary" disclosure by the news media anyway, and if there is anything to report, the other party will likely raise what news organizations miss. The burden which financial reporting places on the largely symbolic candidacies of minor party candidates, however, should not be overlooked. Disclosure of assets and organizational leadership positions may burden the freedom of association of such candidates and their supporters. Elimination of the financial reporting requirement for presidential and vice presidential candidates would deny the public no essential information while removing a non-trivial burden on persons with every right to propose their name for office.

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[96] 5 U.S.C. app. § 201(c) (1982).

Special government employees represent a second category of persons who are presently required to make financial disclosure if they work over 60 days in a year.[97] They should be required to disclose only if their particular responsibilities are sufficiently sensitive that a specific requirement is imposed by the Office of Government Ethics. Special government employees present unusual problems because by definition they work part-time. Thus, they are more likely to be engaged in private activities which present potential conflicts. They also, however, have less reason to provide the government with their expertise and intrusive reporting runs a substantial risk of discouraging important part-time service. A case-by-case approach, focused on the potential for conflict of interest presented by the combination of the particular individual and the specific position, seems the best way to balance these concerns.

Finally, designated agency ethics officials seem to be required to report solely out of a concern that ethics officials also be seen as ethical as well. No one can argue with the spirit of that objective, but symbolism should not supercede the principle that there should be a reason for concern that an official has the opportunity for self-dealing that the financial disclosure provisions can help monitor. Individual designated agency ethics officials, virtually all of whom have other responsibilities in the agency as well, should not be reached by the Act unless the other role which they have would justify coverage by virtue of its grade or responsibilities.

B. WHAT SHOULD BE REQUIRED TO BE DISCLOSED?

Here again, the information required from reporting officials should be limited to that which may reveal the existence of a prohibited conflict, not information which primarily appeals to the curiosity of citizens. Further, only information that can be supplied clearly and accurately should be required.

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[97] 5 U.S.C. app. § 201(h) (1982). The Director of the Office of Government Ethics may grant a waiver to such persons if (1) they will work no more than 130 days in the year, and (2) it is unlikely that the employment of the individual will result in a conflict of interest. *Id.* § 210(i).

President Bush's original proposal that officials report the exact value of their individual assets was particularly unfortunate under these standards.[98] An official who has $1,500 worth of a stock faces as clear a conflict of interest as she would if the stock were valued at $15,000. Some broad categories may be appropriate to reveal extremely large holdings, but even rounding to the nearest $1,000 demands much greater specificity than is required to serve any public purpose.

Further, the problem with providing exact valuations of many assets has already been discussed.[99] Saying that "good faith" estimates will be permitted does not avoid the problem. Ethics compliance is often fought out in the newspapers rather than the courts. If an outside appraiser comes up with a different valuation on an official's home than appeared on the disclosure form, for example, "good faith" will be a legal defense but not a safe harbor. A person who is concerned about taking a government position anyway is likely to think much harder about doing so if the ethics law does not make compliance turn on clearer categories and concepts than "good faith" estimates of specific value.

Reporting the exact value of gifts and reimbursements raises the same kinds of questions of valuation. Here the concern about bribery is real, but, for example, it would be hard to know the exact value of a weekend at a friend's home at the beach. The fact of such gifts in kind should be reported (although a de minimis amount should be recognized), and a general description of the gifts, but requiring even estimates of their dollar value is both difficult and largely unrelated to the nature of the relationship which raises ethical concerns.

Next, reporting the official's home mortgage liability is likewise unlikely to serve more than the interest of voyeurs. While the home mortgage is often a large liability, the financial disclosure form should not be used to let the public play amateur financial planner for public officials. The fact that the official has substantial equity, or does not, should not affect the public's business. One might have special rules for officials whose responsibilities involved supervision of lending institutions, or special rules if the lender is an individual with whom the official has official business dealings. Apart from those special cases, however, more disclosure is not necessarily better than less.

Likewise, routine disclosure of debts owed to family members would ordinarily serve no public purpose. Even excluding loans from the official's closest relatives, the fact that the official borrowed the down payment on her home from her great aunt is not the public's business. Again, one should have special rules if the great aunt is a government contractor, for example, but that is not the nature of the President's proposal, and this is another case where more information does not necessarily mean higher ethical standards.

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[98] *Supra* note 74, at § 202(a)(3).

[99] *See supra* text accompanying note 99.

Finally, reporting the income received by the official from assets that are already reported is excessive.[100] The income figure does not add to the stock of information about the official's potential conflicts. This requirement, as well, could be removed without loss of the ability to enforce the underlying ethics laws.

CONCLUSION

No one could seriously propose today that public interest in the ethics of government officials be reduced. The concern is deep, pervasive, and appropriate. In that context, public financial disclosure has come to play an important role in identifying and deterring officials' self-dealing. Between the minimum regulation one could defend, and the maximum regulation one could imagine, however, there exists a wide range for judgment. Regulation seems to increase because policy makers seem to believe that one cannot be criticized for being "tougher" or "more ethically sensitive" than one's political opponents.

In reality, however, more financial disclosure will not necessarily lead to higher ethical standards than somewhat less disclosure will. This article has tried to make suggestions for statutory revisions based on the principle that financial disclosure should support primary ethics objectives rather than being a primary objective itself.

If the law can be tailored (1) to reach only officials whose responsibilities present a significant possibility of conflict of interest, (2) to ask for no more information than is necessary to reveal such conflicts, and (3) to provide a system by which reports can be randomly audited so as to assure their accuracy and completeness, the system of financial reporting can serve the purpose for which it was intended without imposing excessive costs on potential officials and ultimately the public.

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[100] 5 U.S.C. app. § 202(a)(1)(B).

Biotechnology and the Design of Regulation

*Sidney A. Shapiro**

INTRODUCTION

Modern technology has brought wondrous benefits to society, but not without creating significant risks to people and the environment. Regulation can prevent, or at least mitigate, some of these dangers, but it can also inhibit innovation and product development. Choosing a regulatory scheme that neither overregulates nor underregulates new technologies is one of the most difficult tasks facing modern government.

Recent developments in biotechnology present the newest challenge to our ability to design effective and efficient regulatory structures. While these new technologies have the potential to revolutionize medicine, agriculture, and manufacturing, they could also generate products that are extremely dangerous. Unfortunately, a contentious debate between those who warn that strict regulation will destroy America's most promising new industry and those who warn that weak regulation will lead to environmental disasters has stymied the federal government's response to these potential risks. As Section I explains, two countervailing considerations exacerbate this debate and its consequent regulatory paralysis. First, many options that would make regulation less burdensome to industry would also reduce the government's ability to protect the public and the environment. Second, the lack of scientific consensus concerning the dangers posed by some biotechnology products makes it difficult to determine the proper scope of regulation. Those who advocate a minimum of regulation in the interest of a more efficient system generally believe the risks inherent in biotechnology are less than those who advocate maximum environmental and human protection.

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This Article considers how the federal government should redesign its system for regulating biotechnology, given that government policymakers have chosen to adapt preexisting statutes rather than enact new legislation. The adaptation process presents four types of problems. First, the White House and Congress must confront the problem of incomplete and inadequate regulatory coverage. Presently, biotechnology is regulated under several different statutes that were enacted to prevent or reduce society's exposure to unsafe or harmful products or substances, including some statutes written for the regulation of chemicals. Second, the White House must take the responsibility for coordinating regulatory activities because several executive branch agencies are involved in regulating biotechnology. Third, these agencies must consider how to reduce regulatory delay. Finally, the agencies must adopt procedures that ensure public participation in their decisionmaking because participation is essential to public acceptance of biotechnology.

Section II analyzes the problem of incomplete and inadequate regulatory coverage. This problem was created when the White House rejected the suggestion that new legislation was needed to regulate adequately the research and production of new biotechnology products. The White House based its decision on the belief that existing statutory authority was sufficient for that task, although it admitted that additional regulations issued under existing authorities would be necessary. Section II concludes that this judgment was generally sound, but that legislation may be necessary to plug jurisdictional gaps and to give the Environmental Protection Agency (EPA) additional authority to regulate the environmental release of genetically engineered microorganisms.

Section III documents the collapse of White House efforts to coordinate biotechnology regulation caused by political infighting among the participating agencies. It explains that White House efforts to direct EPA's regulation of the environmental release of genetically engineered organisms have caused EPA to withdraw from current coordination activities. Section III concludes that White House efforts at coordination will remain moribund unless they are restructured to avoid the types of political disagreements that led to their demise.

Sections IV and V discuss which methods and procedures of regulation should be used. Section IV explores how current controversies concerning biotechnology risk assessment and management affect the ability of agencies to adopt more efficient methods of regulation. It concludes that agencies can regulate more effectively by improving their capacity for risk assessment and by relying on consensus-building approaches, such as advisory committees and regulatory negotiation.

Section V endorses the current use of notice and comment procedures to obtain public input, but recognizes the need for some changes to ensure the legitimacy and accuracy of agency decisionmaking. These changes include providing additional notice of pending regulatory actions to citizens who live near proposed release sites, holding informal public hearings to supplement written procedures when a pending regulatory action is of unusual public interest, and seeking ways to meet the public's need for information about pending regulatory decisions while protecting the interests of those who submit confidential business information.

Designing an effective and efficient regulatory system is not the government's only challenge concerning biotechnology. Decisionmakers must consider other important issues not covered by this Article, such as what types of biotechnology research should receive government funding and how to address the ethical, economic, and social implications of biotechnology. At the present time, however, no issue is more pressing than restructuring the regulatory system to provide adequate protection for the public and the environment.

I

BIOTECHNOLOGY: AN OVERVIEW

Biotechnology, as well as its regulation, is in a process of evolution. Important biotechnology innovations have been developed, yet their commercial potential remains largely unrealized. Scientific knowledge about the possible dangers of these advances is also evolving. Although the existing data suggests that some products pose significant environmental dangers, the data is inadequate to judge the potential danger of many other products. Finally, the government is still developing its response to biotechnology. Though a few regulatory programs are in place, most have yet to be designed.

A. The Benefits of Biotechnology

While forms of biotechnology have existed for thousands of years, recent scientific advances have created innovative new techniques for manipulating the genes of living organisms.[1] Recombinant DNA (rDNA) was the first breakthrough in genetic manipulation.[2] Newer techniques, such as direct transfer[3] and cell fusion,[4] have since been developed. These have the potential to create new organic pesticides[5] and fertilizers,[6] new methods of manufacturing food,[7] and improved means of pollution control and oil recovery.[8] Genetic engineering is also expected to produce new drugs, biologics, and diagnostic products for humans[9]

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[1] Biotechnology began with the domestication of plants as much as 10,000 years ago. The prehistoric development of winemaking and the development of brewing in the 11th century are other early examples of biotechnology. Modern biotechnology was born with the discovery of the structure of deoxyribonucleic acid (DNA) in 1953. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONG., NEW DEVELOPMENTS IN BIOTECHNOLOGY — FIELD-TESTING ENGINEERED ORGANISMS: GENETIC AND ECOLOGICAL ISSUES 34 (1988) [hereinafter OTA, FIELD TESTING]. The discovery of restriction enzymes in the early 1970's gave scientists the ability to move specific pieces of DNA within and between organisms. P. WHEALE & R. MCNALLY, GENETIC ENGINEERING: CATASTROPHE OR UTOPIA 3-38 (1988).

[2] This technique uses chemicals to break open a group of cells and remove DNA. Enzymes are then used to cut DNA molecules into segments that can be introduced into a host cell, which is induced to incorporate the desired segment of DNA. By this means, DNA from

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different organisms, or from the same organism, is recombined to form a new DNA sequence not found in nature. P. WHEALE & R. MCNALLY, *supra* note 1, at 25-38.

[3] Direct transfer methods facilitate a cell's uptake of DNA from the surrounding medium without the use of recombinant techniques. Direct transfer can be accomplished by chemical poration (transfer by use of a chemical solution), electroporation (transfer by use of electrical impulses), projectile techniques (transfer by use of gun), and injection (transfer by use of microscopic glass needles). M. MELLON, BIOTECHNOLOGY AND THE ENVIRONMENT: A PRIMER ON THE ENVIRONMENTAL IMPLICATIONS OF GENETIC ENGINEERING 21-22 (1988) (Report for the National Wildlife Federation). The newest method of transfer uses sperm as the vehicle. Schmeck, *Simplified Gene Transplant Method Reported,* N.Y. Times, June 2, 1989, at 1, col. 2.

[4] In this technique, two cells are fused through the use of chemicals or electricity. Although the process does not involve the transfer of pieces of DNA, the hybrid cell created by the fusion can have a novel genetic constitution. M. MELLON, *supra* note 3, at 22.

[5] Biotechnology is expected to produce biodegradable microbial pesticides derived from bacteria, viruses, and fungi with the ability to synthesize toxins poisonous to specific insects. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONG., COMMERCIAL BIOTECHNOLOGY: AN INTERNATIONAL ANALYSIS 183-84 (1984). It could also be used to transfer a pesticide-producing gene into a plant to improve the plant's natural defense system. M. MELLON, *supra* note 3, at 25.

[6] Biotechnology can produce microorganisms that control soil pH and salinity. It can also endow bacteria with enhanced nitrogen-fixing capabilities such as those that now coexist symbiotically with certain legumes. McGarity, *Federal Regulation of Agricultural Biotechnologies,* 20 U. MICH. J.L. REF. 1089, 1092 (1987).

[7] *See* Moshy, *Biotechnology: Its Impact on Traditional Food Processing,* in BIOTECHNOLOGY IN FOOD PROCESSING 8 (S. Harlander & T. Labuza eds. 1986). Products for food processing include bacterially grown enzymes for making saccharin, ethanol, fructose, red food color, and a yeast strain for increasing the alcohol percentage in beer production. Comment, *An Overview of FDA Regulation of Biotechnology Derived Products: Dealing With the Collision of Science and Society,* 11 RUTGERS COMPUTER & TECH. L.J. 501, 503-04 (1985) [hereinafter Comment, *An Overview of FDA*]. Microorganisms used to improve the texture or flavor of cheese are also being developed. McNamara, *FDA Regulation of Food Substances Produced by New Techniques of Biotechnology,* 42 FOOD DRUG COSM. L.J. 50, 59 (1987). Moreover, a single-cell protein that could serve as a possible substitute for traditional sources of animal and human protein is on the horizon. J. DOYLE, ALTERED HARVEST 294-97 (1985).

[8] Bacteria engineered to generate carbon dioxide could be injected underground to create pressure to help recover oil from wells. M. MELLON, *supra* note 3, at 28. Industrial applications of microbes that degrade pollutants include dissolving oil in spills, cleaning up toxic landfills, and treating sewage. *Id.*; *see also* McGarity & Bayer, *Federal Regulation of Emerging Genetic Technologies,* 36 VAND. L. REV. 461, 471-72 (1983).

[9] New or anticipated drugs include human insulin, human growth hormone, and hormones to treat infertility. New or anticipated biologics include interferon, vaccines (for diseases such as hepatitis B, influenza, and leprosy), coagulation factors and other blood components, and therapies for cancer. Comment, *An Overview of FDA, supra* note 7, at 503. New or anticipated diagnostic tools include *in vitro* diagnostic tests (for such conditions as glucose oxidase, AIDS, and pregnancy) and specific prenatal tests for blood disorders such as thalassemia and sickle-cell anemia. *Id.* In a related development, researchers are also breeding gene-altered mice for medical experimentation. *See, e.g., DuPont to Market Gene-Altered Mice for a Cancer Study,* N.Y. Times, Nov. 17, 1988, at A26, col. 1.

and animals.[10] Finally, the new techniques are likely to improve the results of plant[11] and animal[12] breeding.

If the new methods of biotechnology are indeed used for such purposes, almost no area of the economy would remain untouched. Potential applications for biotechnology have been identified for industrial sectors now accounting for up to seventy percent of the annual American gross national product.[13] Almost no country will remain unaffected. By the year 2000, annual worldwide sales of bioengineered products could reach $40 billion.[14] Beyond this economic influence, "it has been clear to all observers that biotechnology is a profoundly powerful new technical form that contains the possibility, indeed the probability, of transforming society in important ways."[15] The changes that may be wrought range from potentially profound changes in human genetics[16] to the alteration of who produces the foods we eat.[17]

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[10] Vaccines are being developed against such animal diseases as rabies, foot-and-mouth disease, and bovine leukemia. OTA, FIELD TESTING, *supra* note 1, at 128. *See also* McGarity, *supra* note 6, at 1092; von Oehsen, *The FDA's Regulation of Veterinary Biotechnology: Business as Usual or A New Era of Environmental Protection*, 43 FOOD DRUG COSM. L.J. 847, 851 (1988).

[11] Major innovations anticipated in agriculture include: crops more resistant to diseases caused by viruses, bacteria, fungi, and insects; crops better able to absorb and use fertilizer; crops genetically modified to fix their own nitrogen; plants with increased photosynthetic efficiency; crops with greater resistance to stresses brought on by drought, salinity, chill, and frost; crops with higher ratios of edible to nonedible parts, fewer structural weaknesses, and higher yields of economically important plant constituents; plants with improved nutritional value; and regulation of plant growth to allow harvest of uniformly ripe fruits and vegetables. Kinney, *USDA Agricultural Research Service: Biotechnology in Farm Policy*, 3 NOTRE DAME J.L. ETHICS & PUB. POL'Y 145, 155 (1987).

[12] New and anticipated developments in animal engineering include increasing the tolerance of striped trout and bass to cold by inserting genes derived from winter flounder. OTA, FIELD TESTING, *supra* note 1, at 131; Thornton, *Superfish: Coming Soon to a Lake Near You?*, SPORTS ILLUSTRATED, Mar. 7, 1988, at 14. Growth hormone genes are being transferred from trout to carp to create a faster growing fish. M. MELLON, *supra* note 3, at 28-29. The transfer of bovine embryos, and other livestock engineering techniques, are being used to upgrade breeding stock, to perpetuate certain favored pedigrees, and to increase beef production and dairy yields. J. DOYLE, *supra* note 7, at 282; Brown, *Biotechnology Gains Acceptance in Poultry Industry*, FEEDSTUFFS, Nov. 14, 1988, at 14.

[13] S. MCAULIFFE & K. MCAULIFFE, LIFE FOR SALE 26 (1981).

[14] Russel, *The Marketing of Genetic Science*, 5 AMICUS J. 14 (1983).

[15] J. KLOPPENBURG, JR., FIRST THE SEED: THE POLITICAL ECONOMY OF PLANT BIOTECHNOLOGY (1492-2000), at 199 (1988).

[16] *See generally* J. RIFKIN, ALGENY (1983).

[17] *See generally* C. HASSEBROOK & G. HEGYES, CHOICES FOR THE HEARTLAND; ALTERNATIVE DIRECTIONS IN BIOTECHNOLOGY AND IMPLICATIONS FOR FAMILY FARMING, RURAL COMMUNITIES, AND THE ENVIRONMENT (Dec. 1988) (Report for the Center for Rural Affairs); Tangley, *Biotechnology on the Farm: Will New Technology Further Disrupt Our Troubled Agricultural Communities?*, 36 BIOSCIENCE 590 (1986).

B. *The Risks of Biotechnology*

Although modern biotechnology holds great promise, it also brings new risks. What if potentially dangerous microorganisms[18] or toxic plants and animals[19] are created? Leaks in fermentation manufacturing or other similar processes could result in workplace contamination.[20] Widespread release of genetically altered microorganisms into the environment, perhaps for use as pesticides or to enhance oil recovery, could result in environmental contamination.[21] Finally, the ingestion of genetically modified plants, animals, or their byproducts that are toxic or impure could cause human illness.[22]

The risks of workplace contamination and unsafe foods are generally regarded as similar in magnitude to the risks posed by the use of natural organisms in manufacturing and the use of conventional breeding techniques in food production.[23] No similar consensus exists concerning the magnitude of the risks posed by the general release of microorganisms.[24] While most experts agree that products like pathogens and plant pests are dangerous, they disagree on whether other products may be dangerous. Moreover, even where experts agree that a product may be dangerous, they disagree about the magnitude of the danger. These disagreements have arisen because of uncertainties in how to assess risks.

1. *How Risks Are Assessed*

The process of assessing risks involves two different activities. The first step is hazard assessment, identifying how an organism might be harmful.[25] An organism can be harmful if it is a pest or pathogen, or if it will enhance existing, or create new, pests or pathogens.[26] For example, viruses could infect beneficial insects as well as the targeted host.[27] Genetically engineered food might inadvertently increase the level of an existing toxic substance or add a new one.[28] Organisms could also transmit novel genetic material to a nontarget host.[29] For example, genetic engineering involving benign wild plants could change them into disruptive weeds.[30]

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[18] McGarity & Bayer, *supra* note 8, at 469.

[19] Comment, *An Overview of FDA*, *supra* note 7, at 519.

[20] *See infra* text accompanying notes 53-56 (discussion of degree of risk posed by closed systems).

[21] In these circumstances, it may be difficult, or even impossible, to locate the millions of organisms that have been released. Harlow, *The EPA and Biotechnology Regulation: Coping with Scientific Uncertainty*, 95 YALE L.J. 553, 559 (1986). If such organisms threatened natural organisms or the environment, they could cause substantial damage. *See infra* text accompanying notes 61-81 (discussing the risks of environmental release).

[22] Comment, *An Overview of FDA*, *supra* note 7, at 517.

[23] According to the Occupational Safety and Health Administration (OSHA), no additional regulation of workplaces using biotechnology is needed because no hazards from biotechnology per se have been identified. OSHA, Agency Guidelines on Biotechnology, 50 Fed. Reg. 14,468 (1985).

[24] *See infra* text accompanying notes 61-81.

[25] Gillett, *Risk Assessment Methodologies for Biotechnology Impact Assessment*, 10 ENVTL. MGMT. 515-16 (1986). This analysis must identify the source of the risk, its potential adverse consequences, and the probability of these consequences. *See* OTA, FIELD TESTING, *supra* note 1, at 110.

[26] NATIONAL ACADEMY OF SCIENCES, INTRODUCTION OF RECOMBINANT DNA-ENGINEERED ORGANISMS INTO THE ENVIRONMENT: KEY ISSUES 14-15 (1987) [hereinafter NAS, 1987 REPORT]; OTA, FIELD TESTING, *supra* note 1, at 112-13 (discussing the risks of

An organism can also be harmful if it displaces natural species or disrupts ecosystems.[31] If oil-eating microorganisms persist and feed on naturally occurring hydrocarbons, they could deprive a water ecosystem of oxygen and other nutrients on which naturally occurring species depend.[32] Similarly, if microorganisms designed to modify soil pH or add nutrients to the soil found a niche in soils not used for crops, or if they modified the pH or increased the nutrient content of lakes and waterways, they could harm plants or fish.[33]

The second step in assessing risk is exposure assessment—estimating the amount of the organism to which the environment, people, or other organisms might be exposed.[34] The degree of exposure depends on two factors. The first factor is whether the organism will survive and reproduce.[35] If it will not survive, there is little likelihood that the organism poses any ecological or human risk. The other factor is the extent to which the organism will be disseminated beyond the site of its release. If widely disseminated by the wind, water, or insects, it is more likely to cause serious damage.[36] Some experts are concerned that the risks of

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pests or pathogens); Ecological Society of America, *The Release of Genetically Engineered Organisms: A Perspective from the Ecological Society of America*, 70 ECOLOGY 297, 301 (1989) [hereinafter ESA Report]. Pests are organisms, such as insects, bacteria, fungi, parasitic plants, and viruses, that can injure or cause disease in plants. *See* 7 U.S.C. § 150aa(c) (1988) (definition of "plant pest"). Pathogens are organisms, including pests, that can cause disease in plants or animals. OTA, FIELD TESTING, *supra* note 1, at 141.

[27] ESA Report, *supra* note 26, at 301.

[28] Gibbs & Kahan, *Federal Regulation of Food and Food Additive Biotechnology*, 38 ADMIN. L. REV. 1, 17 (1986).

[29] OTA, FIELD TESTING, *supra* note 1, at 80. Gene transfer between species occurs by only a limited number of mechanisms, including hybridization and transformation. *Id.* at 11-12; *see generally* Alexander, *Spread of Organisms with Novel Genotypes*, in BIOTECHNOLOGY AND THE ENVIRONMENT: RISK & REGULATION 115, 116-18 (A. Teich, M. Levin & J. Pace eds. 1985) (Proceedings of a Seminar Series conducted for the Environmental Protection Agency by the American Association for the Advancement of Science).

[30] See ESA Report, *supra* note 26, at 304.

[31] NAS, 1987 REPORT, *supra* note 26, at 16-17; OTA, FIELD TESTING, *supra* note 1, at 88-101; ESA Report, *supra* note 26, at 301.

[32] McChesney & Adler, *Biotechnology Released From the Lab: The Environmental Regulatory Framework*, 13 ENVTL. L. REP. 10,366, 10,368 (1983) (Envtl. L. Inst.).

[33] McGarity, *supra* note 6, at 1094.

[34] Gillett, *supra* note 25, at 516; *see* OTA, FIELD TESTING, *supra* note 1, at 110 (analysis must consider extent of exposure, analyze the relationship between exposure and extent of risk, and estimate the overall risk).

[35] OTA, FIELD TESTING, *supra* note 1, at 111; *see* ESA Report, *supra* note 26, at 302.

[36] OTA, FIELD TESTING, *supra* note 1, at 111; *see* ESA Report, *supra* note 26, at 302-

engineered microorganisms may be greater than those of genetically altered plants or animals because microbes are invisible, easier to disseminate, and able to reproduce more readily under favorable conditions.[37]

2. *Risk Assessment Data*

To make these assessments, analysts need data. They may consider the fate of organisms in laboratory experiments, in traditional methods of breeding, or when a species is introduced into a new habitat. They can also consider the data produced from testing organisms in simulated environments, like greenhouses, or in field tests.

It must be noted that scientists disagree about the usefulness of data generated by laboratory experiences. On one side, most biologists believe that laboratory observations over nearly twenty years indicate that there are no "unique hazards" in the transfer of genes between unrelated species.[38] They also believe that risks associated with the environmental release of these organisms are the "same in kind" as those posed by unmodified organisms or organisms modified by traditional genetic techniques.[39] On the other side, ecologists tend to believe that because laboratory data alone cannot "accurately predict the fate" of genetically modified organisms released into the environment,[40] the "usefulness of data from laboratory studies for predicting the environmental fate of released organisms will vary widely."[41]

The significance of data assembled from observations of the long-term consequences of traditional breeding techniques and from the introduction of natural species into a new habitat or location is also debated.[42] Biologists generally believe that modern techniques, which permit highly specific and precise changes in an organism, are less likely to cause unpredictable or dangerous alterations than traditional, less precise methods of breeding.[43] Ecologists generally believe that modern techniques

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03; Alexander, *supra* note 29, at 121.

[37] Brill, *Safety Issues in Perspective*, in BIOTECHNOLOGY IN AGRICULTURAL CHEMISTRY 297, 299 (H. LeBaron, R. Mumma, R. Honeycutt & J. Duesing eds. 1987). *See* OTA, FIELD TESTING, *supra* note 1, at 7; ESA Report, *supra* note 26, at 301.

[38] *See* NAS, 1987 REPORT, *supra* note 26, at 22.

[39] *Id.*

[40] ESA Report, *supra* note 26, at 306.

[41] *Id.*

[42] *Id. See* Regal, *Models of Genetically Engineered Organisms and Their Ecological Impact*, 10 NIH, RECOMBINANT DNA TECH. BULL. 67 (1987).

[43] *See, e.g.*, NAS, 1987 REPORT, *supra* note 26, at 10-11; Young & Miller, *"Old" Biotechnology to "New" Biotechnology: Continuum or Disjunction?*, in SAFETY ASSURANCE FOR ENVIRONMENTAL INTRODUCTIONS OF GENETICALLY-ENGINEERED ORGANISMS 13, 16-22 (J. Fiksel & V. Covello eds. 1987) (proceedings of a NATO Advanced Research Workshop held in Rome, Italy, June 6-10, 1987) [hereinafter SAFETY ASSURANCE]; REGULATORY CONSIDERATIONS: GENETICALLY-ENGINEERED PLANTS 16 (1987) (summary of a workshop sponsored by the Boyce Thompson Institute for Plant Research) (plant products created by biotechnology pose "no significantly different risks than have been accepted for decades from

"increase[ ] confidence that unintended changes have not occurred." These advanced techniques do not, however, "ensure that all ecologically important aspects" of an organism's interaction with its environment can be predicted for all environments into which an organism may be released.[44]

In assessing risk, analysts may also consult data derived from testing the organism under controlled circumstances.[45] While experimental data can improve the predictive accuracy of risk assessment, its usefulness is limited in two ways. First, since testing has been limited so far, little data exists concerning many ecological questions.[46] Second, testing methods can be unreliable. For example, the dynamic environment a plant experiences in the field cannot be replicated by greenhouse experiments.[47] Moreover, small-scale field tests may not accurately predict the risks of large commercial applications that occur under different conditions.[48] Finally, gene tracking does not always indicate when genes are transferred from one organism to another because the specially marked gene may not move with the gene under study.[49]

3. *Estimates of Risks*

Estimates of the risks of biotechnology vary according to whether or not genetically engineered products will be deliberately released into the environment. Scientists concur that microorganisms used in sealed manufacturing systems present a relatively limited risk.[50] Likewise, they agree that genetically engineered foods pose limited risks.[51] No similar consensus exists, however, concerning the risks posed by the deliberate release of genetically engineered microorganisms into the environment.[52]

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conventional plant breeding"). Biologists generally believe that genetically modified organisms cannot be compared to nonnative species that have caused damage when introduced into new surroundings. NAS, 1987 REPORT, *supra* note 26, at 14.

[44] ESA Report, *supra* note 26, at 302; *see* Regal, *supra* note 42, at 71.

[45] Model ecosystems, such as greenhouses, that simulate environmental processes can be used to estimate the survivability of organisms and to evaluate potential adverse effects. Travis & Hattemer-Frey, *Risk Assessment Strategies for Biotechnology*, in SAFETY ASSURANCE, *supra* note 43, at 73, 77. Small-scale field tests can be used to project the effects of large-scale commercial uses of organisms. OTA, FIELD TESTING, *supra* note 1, at 4; *see* Brill, *supra* note 37, at 297. Scientists can also monitor the likelihood of gene transfer by tracking whether specially marked genes move between organisms. *See* OTA, FIELD TESTING, *supra* note 1, at 13-15.

[46] *See* Regal, *supra* note 42, at 81 (few empirical studies exist concerning the safety of recombinant populations); Alexander, *supra* note 29, at 119 (scientists have scarcely explored the extent to which microorganisms introduced into the environment will survive).

[47] Brill, *supra* note 37, at 297; *see* OTA, FIELD TESTING, *supra* note 1, at 4.

[48] Harlow, *The EPA and Biotechnology Regulation: Coping with Scientific Uncertainty*, 95 YALE L.J. 553, 560 (1986); *see* Gillett, *supra* note 25, at 522-24.

[49] OTA, FIELD TESTING, *supra* note 1, at 15.

[50] *See infra* text accompanying notes 53-56.

[51] *See infra* text accompanying notes 57-60.

[52] *See infra* text accompanying notes 61-81.

The risks associated with the contained use of well-characterized genetically altered organisms, or organisms modified in ways that will produce predictable results, are generally considered to be no greater than the relatively limited risks posed by natural organisms used in the same environment.[53] Organisms that are produced within a laboratory, industrial fermenter, or other confined facility pose limited risks because it is relatively easy to prevent harm to workers' health or accidental release into the environment through routine biological and physical containment procedures.[54] Nonetheless, contamination can occur from the failure to kill microorganisms at the completion of the manufacturing or laboratory processes, the exhaustion of gases contaminated with organisms, and leaks, spills, or breaches of containment vessels.[55] These dangers can be minimized, however, if workers wear protective gear, if exhaust gases and any leaks are sterilized, and if highly infective microorganisms are not used.[56]

The manufacture of genetically altered foods also poses relatively limited risks. Manufacturers are not likely to use known toxic organisms in the engineering of new foods.[57] Genetically altered organisms used as foods, or to make foods, are not likely to retain the ability to transform themselves in a way that would produce toxic elements.[58] Furthermore, the possibility that a food will be dangerous can be substantially decreased by toxicity screening and by monitoring actual use.[59] Nevertheless, genetically engineered foods may pose greater risks than the foods developed through conventional plant and animal breeding techniques.[60]

In contrast to the consensus about the limited risks of contained systems and food products, the risks of environmental release are the subject of considerable dispute. The controversy, as noted earlier, centers around the disagreement between biologists and ecologists about the value of existing data. Molecular and microbial biologists tend to see modern genetic engineering as an extension of traditional techniques, which have been practiced safely in laboratories and in the field for many years.[61] They are reassured by their safety record in the laboratory and by the high degree of control they have in creating precise genetic combinations with predictable traits.[62] Ecologists and evolutionary biologists tend to focus on the inherent complexity of biological communities and the difficulty of extrapolating laboratory results to actual environmental experience.[63] They believe that "[n]o clear basis presently exists for assessing the potential impacts of the application of biotechnology products in the environment."[64]

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[53] *See* McGarity & Bayer, *supra* note 8, at 470-71; *see also* OSHA, Agency Guidelines on Biotechnology, 50 Fed. Reg. 14,468 (1985).

[54] McGarity & Bayer, *supra* note 8, at 469-70.

[55] *Id.*

[56] *Id.*

[57] *See* M. MANTEGAZZINI, THE ENVIRONMENTAL RISKS FROM BIOTECHNOLOGY 56 (1986).

[58] The relative likelihood that an organism will retain an ability to transform itself, or that transference of DNA will occur, is considered "remote," but should not be ignored. Pape, *Regulation of New Technologies: Is Biotechnology Unique?*, 44 FOOD DRUG COSM. L.J. 173, 178 (1989).

[59] M. MANTEGAZZINI, *supra* note 57, at 54-56.

[60] Biotechnology may present unique risks because it permits a quicker and greater degree of genetic innovation than conventional breeding techniques. *See* Pape, *supra* note 58, at 177-78.

These differences of opinion are reflected in two prominent reports, each authored by a different group of scientists. A 1987 National Academy of Sciences (NAS) report gives the biologists' perspective, concluding that risks of releasing rDNA organisms are "the same in kind" as the risks of releasing unmodified organisms or those modified by traditional genetic techniques.[65] By comparison, a 1989 Ecological Society of America (ESA) report concludes that genetically engineered organisms should be introduced into the environment "cautiously" because they can cause a variety of undesirable outcomes.[66]

Two other reports take an intermediate stance. A report by the Office of Technology Assessment (OTA) in 1988, which has been characterized as a "flashing yellow light,"[67] concludes that "there are reasons to continue to be cautious, but there is no cause for alarm."[68] A 1989 NAS report concludes that an "extensive body of information documents safe introductions of some microorganisms" into the environment.[69] However, for microorganisms without "an established record of safety," the report cautions that it is "prudent" to control the conditions under which the microorganisms are tested according to whether there is "low, moderate, or high uncertainty" concerning their safety.[70]

As their conclusions suggest, the reports have contradictory hazard and exposure assessments. The 1987 NAS report and the ESA and OTA reports agree that pathogens and pests must be carefully handled,[71] but the 1989 NAS report downplays the risks posed by the transfer of genes from a pathogen to a nonpathogen.[72] The reports disagree about the risks posed by combining genes from two different species (intergenetic combinations). The 1987 NAS report finds that intergenetic modifications present "no unique hazards."[73] ESA predicts that "[o]rganisms with novel combinations of traits are more likely to play novel ecological roles."[74] OTA concludes that the matter is an unresolved question.[75] In addition, the 1987 NAS report finds that "most" engineered organisms will be less likely to survive and reproduce than their parents.[76] While ESA agrees, it warns that "some important exceptions might arise."[77] Finally, the 1989 NAS report distinguishes between those intergenetic combinations that are familiar and have a safe history of usage in the environment and those that are unfamiliar and have some potential for adverse environmental effects.[78] It claims, however, that any potential environmental harms from field testing organisms in the second category can be avoided by "the use of appropriate strategies for biological confinement of the introduced microorganism and its genetic material."[79]

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[61] *See, e.g.*, Brill, *supra* note 37, at 297.

[62] *See, e.g.*, Colwell, *Ecology and Biotechnology: Expectations and Outliers*, in SAFETY ASSURANCE, *supra* note 43, at 176.

[63] *See, e.g.*, ESA Report, *supra* note 26, at 306. Ecologists also argue that most of the early rDNA work by biologists was with organisms designed to perish outside special conditions provided in the laboratory. They argue that this experience has only limited relevance to understanding the risks presented by organisms designed to survive and reproduce outside of the laboratory. *See* Colwell, *supra* note 62, at 169-70.

[64] Gillett, *supra* note 25, at 515.

[65] NAS, 1987 REPORT, *supra* note 26, at 22.

[66] ESA Report, *supra* note 26, at 307 (quoting Goodman, Hauptli, Crossway & Knauf, *Gene Transfer in Crop Improvement*, 236 SCI. 48-54 (1987)).

[67] Gladwell, *Report Boosts Biotechnology Experiments*, Wash. Post, May 5, 1988, at E1 (quoting Val Giddings, director of the OTA staff that produced the study).

[68] OTA, FIELD TESTING, *supra* note 1, at 4.

[69] NATIONAL ACADEMY OF SCIENCES, FIELD TESTING GENETICALLY MODIFIED ORGANISMS: FRAMEWORK FOR DECISIONS 124 (1989) [hereinafter NAS, 1989 REPORT].

[70] *Id.* at 125.

The 1987 NAS report and the ESA report vary widely in their estimates of the risks posed by the deliberate release of genetically engineered organisms. The gulf between the two reports is tied to differences in the scientific perspectives of biologists and ecologists. The OTA report, which evaluates the claims of both groups of scientists, accepts as valid some of the concerns of the ecologists.[80] Likewise, the 1989 NAS report admits the potential for adverse ecological effects, but it expresses confidence that with appropriate testing microorganisms can be safely used in the environment.[81]

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[71] NAS, 1987 REPORT, *supra* note 26, at 15; ESA Report, *supra* note 26, at 308; OTA, FIELD TESTING, *supra* note 1, at 112. ESA and OTA also agree that deleting a gene from an organism is the least risky type of molecular alteration. ESA Report, *supra* note 26, at 308; OTA, FIELD TESTING, *supra* note 1, at 114. The NAS report does not discuss gene deletions.

[72] NAS, 1989 REPORT, *supra* note 69, at 97. The report notes that because the pathogenicity of a microorganism results from a complex interaction of a number of genes and gene products, it is "highly unlikely" that moving one or a few genes from a pathogen to an unrelated nonpathogen will confer on the recipient the ability to cause disease. *Id.*

[73] NAS, 1987 REPORT, *supra* note 26, at 14.

[74] ESA Report, *supra* note 26, at 300.

[75] OTA, FIELD TESTING, *supra* note 1, at 113-14.

[76] NAS, 1987 REPORT, *supra* note 26, at 11, 14.

[77] ESA Report, *supra* note 26, at 303.

[78] NAS, 1989 REPORT, *supra* note 69, at 100, 111. The report considers safe those microorganisms produced by biotechnology that are identical to organisms previously produced by classical breeding techniques. *Id.* at 84-85.

[79] *Id.* at 111.

[80] *See* OTA, FIELD TESTING, *supra* note 1, at 85-102.

[81] *See* NAS, 1989 REPORT, *supra* note 69, at 4.

C. Regulatory Reaction

The federal government's response to the potential risks of the new biotechnology can be separated into three phases. During the first phase, the National Institutes of Health (NIH) established guidelines for federally funded biotechnology research. Then, the White House Office of Science and Technology Policy (OSTP) coordinated the development of a joint policy statement by other agencies indicating how those agencies intended to regulate the new technologies. In the third and current phase, those agencies are putting into effect, sometimes in modified form, the policies they announced earlier.

The initial NIH research guidelines were promulgated in June 1976,[82] in response to the scientific community's concern that some form of regulation was necessary.[83] From 1978 to 1986, as confidence grew concerning the safety of laboratory research, NIH made three changes in its guidelines. It eliminated the previous prohibition on five classes of experiments, such as the deliberate release into the environment of any organism containing a recombinant DNA molecule, that were originally thought to be too dangerous to undertake.[84] NIH also lowered the stringency of precautions required to prevent accidental release for other types of experiments.[85] Finally, NIH delegated the authority to approve types of experiments considered generally safe to local peer-review committees known as Institutional Biosafety Committees.[86]

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[82] NIH, Guidelines for Research Involving Recombinant DNA Molecules, 41 Fed. Reg. 27,902 (1976). The guidelines established rules for the conduct of some experiments, prohibited others, and established the NIH Recombinant DNA Advisory Committee, which had responsibility for reviewing certain categories of research proposals and recommending to the Director of NIH whether to approve them. *Id.*

[83] After questions concerning the potential hazards of rDNA research were raised at the 1973 Gordon Research Conference on Nucleic Acids, the scientific community accepted a temporary moratorium on some types of experiments, which was proposed by a committee of the National Academy of Sciences. P. WHEALE & R. MCNALLY, *supra* note 1, at 46. After the Asilomar Conference discussed appropriate guidelines for rDNA research, NIH drafted its own guidelines. *Id.*; von Oehsen, *Regulating Genetic Engineering in an Era of Increased Judicial Deference: A Proper Balance of the Federal Powers,* 40 ADMIN. L. REV. 303, 309 (1988). For a history of the developments of the NIH guidelines, see J. GIBBS, I. COOPER & B. MACKLER, BIOTECHNOLOGY & THE ENVIRONMENT: INTERNATIONAL REGULATION 104-05 (1987); Fogelman, *Regulating Science: An Evaluation of the Regulation of Biotechnology Research,* 17 ENVTL. L. REV. 183, 205-11 (1987); Jaffe, *Inadequacies in the Federal Regulation of Biotechnology,* 11 HARV. ENVTL. L. REV. 491, 496-500 (1987); McGarity & Bayer, *supra* note 8, at 501-03.

[84] NIH, Recombinant DNA Research; Proposed Actions Under Guidelines, 46 Fed. Reg. 59,735 (1981) (the five classes of experiments were no longer prohibited, but three of them still required Recombinant DNA Advisory Committee review and NIH approval before initiation).

[85] *See id.*

[86] *Id.* at 59,736; NIH, Recombinant DNA Research; Actions Under Guidelines, 47 Fed. Reg. 17,168 (1982). *See generally* NIH, Guidelines for Research Involving Recombinant DNA Molecules, 51 Fed. Reg. 16,958 (1986); 48 Fed. Reg. 24,556 (1983); 47 Fed. Reg. 17,180 (1982).

The second phase began in 1984 when OSTP proposed a "coordinated framework" for biotechnology regulation.[87] This would consist of policy statements by the Food and Drug Administration (FDA), the Environmental Protection Agency (EPA), and the Department of Agriculture (USDA) indicating how these agencies intended to regulate genetically altered organisms.[88] In 1985, OSTP announced the creation of a White House-level advisory committee called the Biotechnology Science Coordinating Committee (BSCC).[89] In 1986, OSTP proposed another version of the "coordinated framework," which assigned the review of specific products to USDA, EPA, or FDA based on the use of the products.[90] OSTP also published revised policy statements by the same agencies and new statements by NIH and the Occupational Safety and Health Administration (OSHA).[91]

The third phase began in 1986, when agencies started the process of deciding how to implement their policy statements. USDA is drafting new safety guidelines for research it sponsors concerning agricultural products created by biotechnology, and it has established regulations for organisms that may be plant pests.[92] EPA is drafting regulations for microorganisms used as pesticides or for other commercial purposes. FDA is contemplating how to regulate genetically altered plants or animals.

The sections that follow analyze the adequacy of the government's regulation of biotechnology. The discussion is organized according to four elements in the design of the current regulatory system: the structure of statutory authorities, interagency coordination, methods of risk assessment and management, and agency procedures.

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[87] OSTP, Proposal for a Coordinated Framework for Regulation of Biotechnology, 49 Fed. Reg. 50,856 (1984).

[88] *Id.* at 50,856-57. At that time, considerable confusion existed concerning how the government would regulate biotechnology research and development that fell outside the NIH guidelines. *See, e.g.*, von Oehsen, *supra* note 83, at 332 (describing how Baylor College of Medicine researchers inoculated 1,400 pigs with an rDNA vaccine with knowledge of one agency of the USDA, but without applying for the license required by another USDA agency); U.S. GEN. ACCOUNTING OFFICE, REPORT ON THE U.S. DEPARTMENT OF AGRICULTURE'S BIOTECHNOLOGY RESEARCH EFFORTS 2, 16, 47-64, app. VIII (1985) (USDA had failed to assess environmental risks for 84 of the 87 biotechnology research projects funded).

[89] OSTP, Coordinated Framework for Regulation of Biotechnology; Establishment of the Biotechnology Science Coordinating Committee, 50 Fed. Reg. 47,174, 47,176 (1985).

[90] OSTP, Coordinated Framework for Regulation of Biotechnology; Announcement of Policy and Notice for Public Comment, 51 Fed. Reg. 23,302, 23,302-06 (1986).

[91] *Id.* at 23,309-50.

[92] 7 C.F.R. pts. 330, 340 (1989).

II

REGULATORY STRUCTURE: MAKING THE MOST OF EXISTING STATUTES

The Reagan Administration made a fundamental policy choice concerning the regulatory structure for biotechnology. It determined that biotechnology could be safely regulated under existing legislative authority and that no new legislation was necessary to protect the public or the environment. For this reason, genetically engineered organisms are now regulated under a variety of statutes that address the dangers of experiments and products that may threaten the environment or individuals. This structure poses three challenges to effective regulation. First, different agencies may have concurrent jurisdiction over the same experiment or product. While this problem is not unique to biotechnology, it deserves attention here because research and development in the still-infant biotechnology industry may be discouraged by the costs of duplicative regulation. Second, reliance on existing statutes has left gaps in the regulatory coverage of biotechnology: some products or types of research are not regulated by any agency. Finally, EPA has been forced to regulate biotechnology under authority given to it by Congress to regulate chemical substances. For this reason, EPA may lack sufficient regulatory authority to regulate some aspects of biotechnology.

The following discussion examines the statutory authority under which biotechnology is regulated to assess its effectiveness as a regulatory structure. Although numerous flaws are noted, the section concludes that the most efficient method of reform is to amend existing laws, rather than to create a new law solely for biotechnology.

A. The 1986 Coordinated Framework

The Office of Science and Technology Policy's 1986 "Coordinated Framework" policy statement[93] was an attempt by the White House to clarify regulatory responsibilities in cases of concurrent jurisdiction and to start agencies on the road to establishing biotechnology regulations. In its Coordinated Framework, OSTP clarified the jurisdiction of each regulatory agency and designated a "lead agency" where two or more agencies had concurrent jurisdiction.[94] OSTP did not define "lead agency," but it apparently intended that this agency would assume the responsibility for coordinating its regulation with the other agencies having concurrent jurisdiction.[95]

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[93] OSTP, Coordinated Framework for Regulation of Biotechnology; Announcement of Policy and Notice for Public Comment, 51 Fed. Reg. 23,302 (1986).

[94] *Id.* at 23,305.

[95] *See id.*

The Coordinated Framework recognizes several instances where two or more agencies have concurrent regulatory authority. For example, EPA regulates microorganisms if they are pesticides or are used for other commercial purposes. Microorganisms that are pesticides come under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[96] EPA has brought other commercial uses of microorganisms under the authority of the Toxic Substances Control Act (TSCA) by defining "chemical substances" to include "organisms."[97]

If the microorganism is also a plant pest, USDA's Animal and Plant Health Inspection Service (APHIS) has regulatory authority as well. APHIS's jurisdiction over microorganisms is granted by the Federal Plant Pest Act (PPA),[98] which defines a "pest" to include organisms that can injure or damage other plants or plant products.[99]

Genetically altered foods or food additives may also be subject to regulation by more than one agency. Foods and food additives are normally regulated by FDA under the Federal Food, Drug, and Cosmetic Act.[100] A food, such as an agricultural field crop, may also be regulated by APHIS if it is a plant pest.[101] In addition, USDA's Food Safety Inspection Service (FSIS) may be involved because of its responsibility to inspect meat and poultry products.[102]

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[96] 7 U.S.C. §§ 136-136y (1988). A "pesticide" is "(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant" except for animal drugs, which are regulated by FDA. *Id.* § 136(u). A "pest" is defined as "(1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other microorganisms . . . which [EPA] declares to be a pest" excluding viruses, bacteria, or microorganisms found on or in any other living animals. *Id.* § 136(t).

[97] Under TSCA, the Administrator of EPA has the authority to regulate hazardous chemical substances. 15 U.S.C. § 2602(1) (1988) ("Administrator" defined as Administrator of EPA); 15 U.S.C. § 2605 (regulation by the Administrator of hazardous chemical substances and mixtures). TSCA defines a chemical substance as "any organic or inorganic substance of a particular molecular identity, including (i) any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature." *Id.* 2602(2)(A). EPA includes microorganisms within the definition of chemical substance because "a living organism is a 'combination of such substances occuring [sic] in whole or in part as a result of a chemical reaction or . . . occurring in nature . . . .' Also, any DNA molecule, other nucleic acid, or other constituent of a cell, however created, is 'an organic substance of a particular molecular identity.' " EPA, Proposed Policy Regarding Certain Microbial Products, 49 Fed. Reg. 50,880, 50,886 (1984). EPA's jurisdictional claim has been challenged by legal commentators, although no suits have been filed as yet. *See infra* note 129 and accompanying text.

[98] APHIS is specifically responsible for PPA. USDA, Animal and Plant Health Inspection Service: Organizations, Functions, and Delegations of Authority, 54 Fed. Reg. 23,193, 23,195 (1989).

[99] Federal Plant Pest Act (PPA), 7 U.S.C. §§ 150aa-150jj (1988). A "plant pest" is any living stage of any form of invertebrate animal, parasitic plant, or virus that can "directly or indirectly injure or cause disease or damage" in any plant or any plant product. *Id.* § 150aa(c). APHIS also claims jurisdiction over microorganisms under the Plant Quarantine Act, 7 U.S.C. §§ 151-167 (1988), which authorizes USDA to institute a quarantine against plants of "any character whatsoever" that are capable of carrying any dangerous plant disease or insect infestation. *Id.* § 161.

[100] 21 U.S.C. §§ 301-393 (1988). "Food" is defined as "articles used for food or drink for man or other animals" or "articles used for components of any such article." *Id.* § 321(f). A "food additive" is "any substance" added by someone "the intended use of which results or

Drugs and biologics are also regulated by more than one agency.[103] FDA regulates the safety and efficacy of drugs and human biologics, but OSHA regulates the risks to workers in the manufacture of those products.[104] APHIS regulates animal biologics, but OSHA would oversee the use of a vaccine if farmworker exposure is an issue, and FDA would enter the picture if residues of the vaccine can be detected in food products.[105]

Jurisdictional overlap also exists in the regulation of noncommercial biotechnology research. Health research funded by NIH and agricultural research funded by the Science and Education division of USDA must comply with the research guidelines established by those agencies.[106] The researcher will also be regulated by APHIS if the research

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may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food." *Id.* § 321(s).

[101] 7 U.S.C. §§ 150aa-150jj (1988). "Plant pest" is defined *supra* note 99. The delegation of authority to APHIS for plant pests is at 7 C.F.R. § 371.2(c)(2)(iv) (1989).

[102] Federal Meat Inspection Act, 21 U.S.C. §§ 601-695 (1988); Poultry Products Inspection Act, 21 U.S.C. §§ 451-470 (1988). USDA has the power to oversee the Federal Meat Inspection Act, 9 C.F.R. §§ 302.1-.3 (1989), and the power to oversee the Poultry Products Inspection Act, 9 C.F.R. §§ 381.3-.7 (1989).

[103] "Drugs" are "articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals," or "articles (other than food) intended to affect the structure or any function of the body of man or other animals." 21 U.S.C. § 321(g)(1)(B)-(C) (1988). A "veterinary biologic" is any natural or synthetic virus, serum, toxin, or microorganism intended for use in the "diagnosis, treatment, or prevention of diseases of animals." 9 C.F.R. § 101.2(w) (1989).

[104] *See* Huber, *Biotechnology and the Regulation Hydra,* TECH. REV., Nov.-Dec. 1987, 57, 58-60. Under the Food, Drug, and Cosmetic Act, FDA has jurisdiction to regulate new human and animal drugs, including human biologics, made by genetic engineering. 21 U.S.C. §§ 351-360b (1988).

[105] *See* Huber, *supra* note 104, at 58-60. APHIS has jurisdiction to regulate animal biologics under the Virus, Serum, Toxin Act, 21 U.S.C.A. §§ 151-159 (West 1972 & Supp. 1989).

[106] NIH requires recipients of its grants for medical and related scientific research to comply with its guidelines for biotechnology research. *See* NIH, Guidelines for Research Involving Recombinant DNA Molecules, 51 Fed. Reg. 16,958 (1986); *see supra* text accompanying notes 82-86. USDA requires recipients of its agricultural research grants to comply with NIH Guidelines for biotechnology research. *See* USDA, Final Policy Statement for Research and Regulation of Biotechnology Processes and Products, 51 Fed. Reg. 23,336, 23,346 (1986); USDA, Statement of Policy for Regulations, Biotechnology Processes and Products, 49 Fed. Reg. 50,897, 50,898 (1984). In June 1986, USDA proposed new guidelines. USDA, Advanced Notice of Proposed USDA Guidelines for Biotechnology Research, 51 Fed. Reg. 23,367 (1986). The guidelines proposed in 1986 have been substantially modified, but the new version has not yet been formally proposed. *See* OFFICE OF AGRICULTURAL BIOTECHNOLOGY, DRAFT USDA GUIDELINES FOR RESEARCH WITH GENETICALLY MODIFIED ORGANISMS OUTSIDE OF CONTAINED FACILITIES (May 1, 1989) [hereinafter USDA DRAFT GUIDELINES].

involves a plant pest or animal biologic,[107] by EPA if it involves a pesticide,[108] and by FDA if it involves a drug or human biologic.[109]

Concurrent jurisdiction may also exist in the regulation of commercial research. EPA and APHIS share jurisdiction when a pesticide may be a plant pest.[110] There is no overlap, however, in the regulation of commercial research for most other products.[111] Moreover, EPA and APHIS have divided responsibility for microorganisms according to whether or not they involve an agricultural use.[112]

The 1986 Coordinated Framework indicated for the first time how the government would approach the regulation of biotechnology. Although it clarified the division of responsibilities, OSTP's framework left many issues unresolved. Sufficient time has now passed for this structure to be evaluated.

B. *Adequacy of the Coordinated Framework*

Before the Coordinated Framework, the biotechnology industry and its critics were uncertain about which agencies regulated which areas of biotechnology.[113] Most observers today give the Coordinated Framework generally good marks for the road map it provides to agency responsibility for regulating biotechnology.[114] Critics argue, however, that while the framework may have clarified the roles of the various agencies, it did nothing to address the three obstacles created by the Reagan administration's decision to regulate biotechnology under existing statutory authority. They assert that regulation is inefficient because agencies have concurrent jurisdiction, that some areas of biotechnology are not regulated by any agency, and that the agencies' existing regulatory authority does not adequately protect the public because it does not adequately address risk assessment.[115]

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[107] *See supra* notes 99, 105.

[108] *See supra* note 96.

[109] *See supra* note 104.

[110] *See* 7 U.S.C. §§ 136-136y (1988) (EPA); 7 U.S.C. §§ 150aa-150jj, 151-167 (1988) (APHIS).

[111] Plants are regulated by APHIS, *see supra* note 99, drugs and biologics by FDA, *see supra* note 104, and animal biologics by APHIS, *see supra* note 105.

[112] OSTP, Coordinated Framework for Regulation of Biotechnology, 51 Fed. Reg. 23,302, 23,304-05 (1986); *see also* EPA, Statement of Policy: Microbial Products Subject to the Federal Insecticide, Fungicide, and Rodenticide Act and the Toxic Substances Control Act, 51 Fed. Reg. 23,313, 23,316 (1986) (pathogenic microorganisms used solely for nonpesticidal agricultural uses are subject to USDA review only).

[113] *See, e.g.*, J. GIBBS, I. COOPER & B. MACKLER, *supra* note 83, at 125. The framework "was developed in response to the confusion that arose about [1984] when the first products of biotechnology emerged and companies were unclear about which federal agencies would review their work and what requirements would be imposed." Henderson, *Biotech Policies Win Praise*, Wash. Post, June 21, 1986, at G2 (industry representatives "praised" framework when it was announced).

[114] According to the House Commission on Science & Technology, the framework is "noteworthy in that it addresses, in a comprehensive manner, the regulation of commercial and research products of biotechnology at an earlier stage than has been the case with the regulation of other developing technologies." SUBCOMM. ON INVESTIGATIONS & OVERSIGHT, HOUSE COMM. ON SCIENCE & TECHNOLOGY, 99TH CONG., 2D SESS., REPORT ON ISSUES IN THE FEDERAL REGULATION OF BIOTECHNOLOGY: FROM RESEARCH TO RELEASE 89 (Comm. Print 1986) [hereinafter REGULATION OF BIOTECHNOLOGY].

1. *Inefficient Regulation*

The first criticism of the Coordinated Framework is that it fails to address the considerable redundancy that may make biotechnology regulation unworkable. Because of this overlap, one observer has predicted that "there is little hope that the profusion of regulatory regimes applicable to industry and university researchers will result in [a] streamlined, efficient, and effective review process."[116]

Agencies have sought to address the problem of regulatory inefficiency by setting up procedures to coordinate their interaction. These include day-to-day contacts between regulators,[117] standing interagency committees,[118] and joint sponsorship of conferences and studies.[119] At least for the present time, these efforts appear to be succeeding. For example, both USDA and EPA are meeting statutory deadlines, generally ranging from 90 to 120 days, for processing applications they receive.[120] However, other key parts of the effort to coordinate agency interaction are not yet in place. As Section III discusses, an interagency committee set up by the White House to assist the agencies in their coordination efforts has dissolved amid controversy and must be reformed.[121] Also, USDA is only in the initial phases of its ambitious National Biological Impact Assessment Program, which will provide researchers with computerized information about relevant guidelines and future regulations.[122]

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[115] *See* Henderson, *supra* note 113, at G2 (relating the opinions of critics of the framework).

[116] M. MELLON, *supra* note 3, at 49.

[117] Interview with Terry Medley, Director Biotechnology and Environmental Coordination Staff, APHIS, USDA, in Hyattsville, Md. (May 30, 1989) [hereinafter Medley Interview]; interview with Henry Miller, Special Assistant to the Commissioner, FDA, in Rockville, Md. (May 30, 1989) [hereinafter Miller Interview].

[118] For example, FDA and USDA have a standing committee to determine whether a new animal product is a drug or biologic. Miller & Young, *FDA and Biotechnology: Update 1989,* 6 BIO/TECHNOLOGY 1385, 1391 (1988).

[119] *See, e.g.,* Fox, *The Federal Scene: Waiting Out the Eclipse,* 6 BIO/TECHNOLOGY 1379, 1380 (1988) (1987 conference on questions of food safety in biotechnology jointly sponsored by FDA, USDA, and EPA).

[120] Medley Interview, *supra* note 117; interview with Amy Rispin, Office of Pesticide Programs, EPA, in Arlington, Va. (May 30, 1989) [hereinafter Rispin Interview]; interview with Ron Evans, Office of Toxic Substances, EPA, in Washington, D.C. (May 31, 1989) [hereinafter Evans Interview].

[121] *See infra* text accompanying note 160.

[122] Interview with David McKenzie, Director of NBIAP, Cooperative State Research

Since the coordination process is still evolving, it is difficult to determine whether the Coordinated Framework will prove unwieldy. Experience does not yet suggest that new legislation is required for effective interagency coordination of biotechnology regulation. However, the capacity of the government to regulate efficiently within the existing statutory structure will be tested more substantially in the next few years when agencies are called on to regulate a larger volume of products and research projects. Because of the importance of biotechnology to the nation's economic and social well-being, the President and the Congress should monitor the fate of the coordination process closely and seek corrective legislation if needed to resolve future problems.

2. *Products No Agency Regulates*

The second criticism of the Coordinated Framework is that some genetically novel organisms may not be regulated by any agency. The National Wildlife Federation, for example, argues that genetically novel animals, "ranging from rats and fish and oysters to insects," are excluded from regulation.[123] In addition, EPA's authority to regulate microorganisms under TSCA may be problematic.[124]

Regulatory gaps over genetically engineered animals do exist, but they are not as broad as the Federation suggests. The release of an engineered animal comes under regulation if the research is funded by the government or if the animal is a plant pest, an agent for animal or human diseases, administered as a drug or biologic, or sold for food.[125] Still, unregulated genetically engineered animals could endanger the environment in some contexts.[126]

Because further information is necessary to determine whether problems might arise from limitations in coverage, the President and the Congress—through OSTP and the Office of Technology Assessment, Congress' research arm—should conduct surveys of biotechnology activ-

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Service, USDA, in Washington, D.C. (June 14, 1989) [hereinafter McKenzie Interview].

[123] M. MELLON, *supra* note 3, at 48-49; *see also* Gibbs & Kahan, *supra* note 28, at 31.

[124] Legal commentators question EPA's jurisdictional claim. *See infra* notes 127-29 and accompanying text.

[125] USDA's Science and Education division research guidelines cover USDA-funded animal research outside of contained facilities. USDA DRAFT GUIDELINES, *supra* note 106, at 3-17. APHIS regulates invertebrate animals, such as insects, which are plant pests, *see supra* note 99, FDA regulates the use of animals as food, *see supra* note 100, and FDA and APHIS regulate the administration of animal drugs and biologics, *see supra* notes 104, 105. Finally, the Public Health Service of the Department of Health and Human Services regulates the interstate movement of etiologic agents that carry human diseases. 42 U.S.C. § 264 (1982 & Supp. V 1987).

[126] The National Wildlife Federation suggests that there are notorious examples of agricultural organisms, such as sorghum and goats, that have escaped from agricultural settings to survive and do great damage in the wild. M. MELLON, *supra* note 3, at 34. A genetically altered goat released from noncommercial research would not necessarily be regulated under the existing regulatory structure. *See infra* text accompanying notes 130-32.

ities not presently regulated. Those areas should then be evaluated to determine whether or not additional federal regulation is necessary.

Amendments may also become necessary to clarify EPA's jurisdiction over microorganisms under TSCA. Under the Coordinated Framework, TSCA is the backstop in the sense that any organism not regulated under some other statute would be regulated under TSCA. For example, microorganisms released into the environment that are not pesticides or plant pests are now regulated under TSCA.[127] For purposes of TSCA regulation, EPA includes "organisms" in its definition of "chemical."[128] But this definition has been challenged as "strained."[129] If the courts rule that TSCA does not apply to microorganisms, the Coordinated Framework would cease to be an effective regulatory approach.

Noncommercial research, such as university-based research, is another area where congressional amendment may be needed to provide regulatory coverage. Under TSCA, EPA has authority to regulate commercial research only.[130] Noncommercial research involving environmental releases would be unregulated unless it is funded by the government or involves a plant pest.[131] EPA is attempting to narrow this gap by applying TSCA to research conducted at universities for commercial purposes, but it is not clear what quantity of university-based research would remain unregulated if EPA's efforts succeed.[132]

Even if EPA's implementation of TSCA substantially closes existing gaps, Congress should amend TSCA to give EPA authority to require prerelease notification of any deliberate release of genetically engineered organisms. The resistance to EPA's attempts to extend TSCA to university-based research indicates that Congressional amendment of TSCA for prerelease notification purposes may also be opposed. Academic scientists, however, are not immune from the types of pressures that cause errors of judgment that endanger people or the environment. Congress should not yield to pressure in this case.[133]

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[127] *See supra* notes 96-99 and accompanying text.

[128] *See supra* note 97.

[129] REGULATION OF BIOTECHNOLOGY, *supra* note 114, at 58 (statement of Monica Riley, representing the American Society for Microbiology) ("the definition of genetically altered microorganisms as 'new chemicals' is strained"); E. KORWECK, THE 1989-90 BIOTECHNOLOGY REGULATIONS HANDBOOK 136-37 (1989); McGarity & Bayer, *supra* note 8, at 506 (although the DNA within microorganisms "can reasonably be characterized as a chemical substance, the EPA may be going too far in calling the entire microorganism a chemical substance").

[130] *See* 15 U.S.C. §§ 2602(3)-(4), 2603(a), 2604(a), 2605(a) (1988).

[131] *See supra* text accompanying notes 106-07.

[132] *See* EPA, DRAFT PROPOSED RULE, MICROBIAL PRODUCTS OF BIOTECHNOLOGY; PROPOSED AMENDMENT TO REQUIRE USER FEES; PREMANUFACTURE NOTIFICATION REQUIREMENTS; DESIGNATION OF SIGNIFICANT NEW USES 34-37 (Dec. 1, 1988) [hereinafter EPA DRAFT RULE]; Fogelman, *supra* note 83, at 257-58.

[133] *See* Burns, Foster & Cheaper, *Laboratory Safety and the Law*, CHEMTECH, May 1988, at 267; *see generally* McGarity, *Contending Approaches to Laboratory Safety*, 28 U. KAN.

A related problem is that TSCA exempts from regulation small quantities of new chemical substances used for scientific research.[134] EPA's draft regulations have proposed a rule that would deny this exemption in cases where there is an environmental release of a genetically engineered organism.[135] EPA takes the position that, because microorganisms can multiply in the environment, there is no such thing as research involving "small quantities" of microorganisms.[136] Since EPA is attempting to define small quantities as no quantity whatsoever, a court might find that the Agency has violated Congress' intent to exempt research and development activities from regulation.

Congress could wait until the issue of EPA's authority is decided by the courts and then make appropriate changes in the agency's regulatory powers. The problem with this approach is that EPA would lack regulatory authority to protect the environment during the period between a dispositive court decision and legislation that would restore the agency's authority to regulate. In the meantime, unregulated products could harm the environment. To prevent such a result, Congress should clarify EPA's regulatory jurisdiction to regulate bioengineered organisms under TSCA.

3. *Inadequate Regulatory Authority*

The final criticism of the Coordinated Framework is that the environmental release of organisms that are not pesticides is underregulated. First, because of concurrent jurisdiction, the existing framework leads to inconsistent regulation, which could result in litigation. Second, USDA's review of microorganisms looks only at whether a genetically engineered organism is a plant pest and ignores potential environmental impacts. Third, EPA lacks sufficient authority under TSCA to regulate microorganisms because of its burden of proving the organisms are dangerous.

The first charge is that the Coordinated Framework will result in inconsistent regulations, inviting litigation. One critic asserts that the "patchwork of law that defines the Coordinated Framework" will produce a "never ending tangle of new definitions, amended definitions, adhoc rule-makings, BSCC subcommittee meetings, scientific advisory committee meetings, exemptions, listings and de-listings, appeals, ad nauseam," which is the "perfect prescription for litigation."[137] This pre-

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L. REV. 183 (1980).

[134] 15 U.S.C. § 2604(h)(3) (1988).

[135] EPA DRAFT RULE, *supra* note 132, at 44-47.

[136] *Id.* at 45.

[137] Letter from Jack Doyle, Director, Agriculture and Biotechnology Project, Environmental Policy Institute, to Ron Evans, Office of Toxic Substances, EPA, at 9 (May 16, 1989). Another critic made the same point differently: " 'Bad rules, like bad art, look better in a frame.' " Lavelle, *Biotech: The Unknown Frontier for Lawyers*, Nat'l J., Feb. 6, 1989, at 1, 28

diction is probably correct. When five different agencies attempt to apply as many as ten different laws to an emerging technology, anything less would be a complete surprise. More vigorous efforts to coordinate current regulations could eliminate at least some of the problems arising from the multiagency approach.[138]

Moreover, a new law written specifically to apply to biotechnology could be subject to similar failings. Major environmental legislation tends to generate considerable litigation to clarify matters left ambiguous by the statute.[139] While a new law could increase the efficiency of biotechnology regulation by housing more aspects in one agency, this advantage, while important, does not necessarily justify a new law.

A second charge is that USDA's lack of a specific mandate to protect the environment means the agency is less likely to protect the environment than EPA.[140] Critics acknowledge that USDA is required to comply with the National Environmental Policy Act (NEPA),[141] but they allege that the agency's past actions indicate a lack of commitment to a comprehensive assessment of environmental dangers.[142] This distrust can be traced to USDA's enthusiastic support for biotechnology in agriculture and its legacy of poorly regulating pesticides when it had that responsibility.[143]

These allegations are difficult to assess objectively because counter evidence exists. USDA's track record in protecting plants and animals from well-known plant pests, noxious weeds, and infectious diseases is impressive.[144] Moreover, USDA has promulgated new regulations that apply the Federal Plant Pest Act to genetically modified organisms that are plant pests.[145] USDA has also engaged in a reorganization intended to increase its regulatory effectiveness and is in the process of hiring additional scientists and other professionals to staff its new effort.[146]

(quoting William Anderson).

[138] OSTP's efforts to coordinate have so far been very weak. See *infra* section III for further discussion.

[139] *See, e.g.*, MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 1-23 (1983).

[140] *See, e.g.*, M. MELLON, *supra* note 3, at 47, 49; *see also* von Oehsen, *supra* note 83, at 326-27.

[141] 42 U.S.C. §§ 4371-4374 (1982).

[142] *See, e.g.*, M. MELLON, *supra* note 3, at 48.

[143] One critic charges that "USDA is in the classic conflict-of-interest situation when it tries to evaluate the release of genetically engineered organisms for their potential environmental effects." Doyle Letter, *supra* note 137, at 9. *See also* Jaffe, *supra* note 83, at 529; McGarity, *supra* note 6, at 1145.

[144] U.S. GEN. ACCOUNTING OFFICE, BIOTECHNOLOGY: AGRICULTURE'S REGULATORY SYSTEM NEEDS CLARIFICATION 31 (1986).

[145] USDA, Plant Pests; Introduction of Genetically Engineered Organisms or Products: Final Rule, 52 Fed. Reg. 22,892 (1987).

[146] Medley Interview, *supra* note 117.

Moving USDA's responsibilities to EPA would not necessarily result in improved regulation. Although EPA is not burdened by USDA's institutional conflict of interest, its effectiveness in regulating chemicals is far from exemplary.[147] Moreover, whereas USDA has institutional experience in evaluating plant pests, EPA would have to develop that expertise. As a result, the transition from USDA to EPA would probably create its own set of management and regulatory problems. These might overwhelm the benefits that ultimately would be garnered from the switch.[148]

Another option would be to give EPA power of review. Professor McGarity has suggested that "[p]erhaps an adequate check on any perceived tendencies on USDA's part to slight risks and accentuate benefits is to provide for dual review of all genetically engineered organisms that might be plant pests."[149] At the current time, EPA does review intergeneric microorganisms containing genetic material from a pathogenic source organism.[150] Providing for EPA review of all of USDA's environmental assessments could be a way to reveal if USDA had a pattern of ignoring important environmental considerations. In cases where USDA has slighted environmental considerations, EPA would be in a position to call any oversight to USDA's attention. This step would also alert environmentalists who might wish to challenge USDA's decision.

The last argument concerning weak regulation is that EPA lacks sufficient regulatory authority under TSCA. Under TSCA, EPA may require a manufacturer to submit health and safety information before a product is sold.[151] However, the Agency must prove that the chemical presents "an unreasonable risk of injury to health or the environment" in order to establish limitations on its use.[152] Because the burden of proof rests with EPA, commentators and environmental groups have expressed doubt that EPA's authority under TSCA is adequate.[153] In other statutes used to regulate biotechnology, the manufacturer has the burden of proving that the product is safe and must have a permit or license before a product can be sold.[154]

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[147] McGarity, *supra* note 6, at 1145.

[148] Moreover, in order to eliminate entirely any conflict of interest, Congress would have to give EPA the authority to supervise agricultural research involving biotechnology now regulated by USDA's Science and Education division. *See supra* note 106 and accompanying text. This switch would compound the transition difficulties.

[149] McGarity, *supra* note 6, at 1148. Professor McGarity also notes that such dual review may be inefficient. *Id.*

[150] EPA, Statement of Policy; Microbial Products Subject to the Federal Insecticide, Fungicide, and Rodenticide Act and the Toxic Substances Control Act, 51 Fed. Reg. 23,318 (1986).

[151] 15 U.S.C. § 2604(a)-(b) (1988). EPA can also require manufacturers to maintain records or submit reports. *Id.* § 2607(a).

[152] *Id.* § 2605. EPA can also order the manufacturer to test the chemical if the chemical "presents or may present an unreasonable risk of injury to health or the environment" and if, because of insufficient information, testing is necessary to develop data to determine the degree of risk. *Id.* § 2603(a).

[153] *See, e.g.*, M. MELLON, *supra* note 3, at 46; Fielding, *Agricultural Biotechnology and the Environment*, 14 INT'L BUS. LAW. 285, 292 (1986); Harlow, *The EPA and Biotechnology*

The logic of regulating some genetically engineered organisms under permitting statutes, but regulating other organisms under TSCA's nonpermit regime, is not immediately apparent. EPA officials express confidence that they can regulate microorganisms safely under TSCA.[155] Certainly, EPA's long-planned TSCA regulations take as cautious an approach to regulating genetically engineered organisms as is possible under TSCA.[156] But the fact remains that TSCA places the burden on EPA to first prove that an organism is dangerous before the Agency can control someone who is determined to release genetically engineered organisms over EPA's objections.

Congress apparently chose not to make TSCA a permitting statute because of concerns about the potential burden a licensing system would place on the chemical industry.[157] The biotechnology industry has told Congress that it should not establish new regulatory burdens over biotechnology for the same reason.[158]

Deciding whether EPA has adequate regulatory authority under TSCA is complicated by two circumstances. First, as discussed earlier, the scientific community is split concerning the degree of risk posed by the release of genetically engineered organisms.[159] Differences in perception about the risks of biotechnology partly explain the differences in perception about the adequacy of TSCA. Second, how large a role TSCA will play in the regulation of biotechnology is not yet clear. If most organisms come within the regulatory jurisdiction of permitting statutes because they are plant pests, pesticides, new drugs, and so on, the fact that TSCA is not a permitting regime will be less important than if EPA ends up regulating a large number of organisms under TSCA.

Regulation: Coping with Scientific Uncertainty, 95 YALE L.J. 553, 564 (1987).

[154] *See, e.g.*, Virus, Serum, Toxin Act, 21 U.S.C.A. § 151 (West 1972 & Supp. 1989); Poultry Products Inspection Act, 21 U.S.C. §§ 451-470 (1988); Federal Meat Inspection Act, 21 U.S.C. §§ 601-695 (1988).

[155] Interview with Alan Carpian, General Counsel's Office, EPA, in Washington, D.C. (June 1, 1989) [hereinafter Carpian Interview].

[156] *See infra* text accompanying notes 252-74.

[157] *See* Outen, *Toxic Chemicals*, in 2 LAW OF ENVIRONMENTAL PROTECTION § 15.01, at 15-5 (S. Novick, D. Stever & M. Mellon eds. 1988).

[158] *See The Biotechnology Science Coordination Act of 1986: Hearings Before the Subcomm. on Natural Resources, Agricultural Research, and the Environment, and the Subcomm. on Science, Research, and Technology, of the House Comm. on Science and Technology*, 99th Cong., 2d Sess. 273 (1986) (statement of Jeffrey Gibbs, Associate General Counsel, Association of Biotechnology Companies) (industry opposes legislation that would establish new regulations for biotechnology).

[159] *See supra* text accompanying notes 18-24.

These circumstances suggest that Congress ought to monitor EPA's progress under TSCA carefully to determine whether legislation is necessary. If it appears that EPA will rely significantly on TSCA to regulate potentially dangerous organisms, Congress should enact an amendment to establish a permit regime for biotechnology that would shift the burden of proof to the industry.

III

REGULATORY COORDINATION: AVOIDING INTERAGENCY CONFLICT

If several agencies are to share the responsibility for regulating biotechnology, they must coordinate their actions in order to regulate effectively and efficiently. In the 1986 Coordinated Framework, OSTP established a Biological Science Coordinating Committee (BSCC) for the purpose of helping agencies coordinate their biotechnology regulatory policies. However, BSCC's efforts have been dogged by controversy and conflict. At the time of this writing, BSCC no longer functions because EPA refuses to attend its meetings.[160] Its demise has left a void which must be filled if there is to be future coordination. This section describes the history of BSCC's efforts to assist agency coordination, analyzes why BSCC failed in those efforts, and recommends ways to reformulate BSCC to avoid the problems that led to its demise.

A. BSCC Hindered By Conflict

BSCC is composed of seven governmental officials from five agencies. The Director of NIH and the Assistant Director for Biological, Behavioral, and Social Services of the National Science Foundation (NSF) chair BSCC on a rotating basis. The other members are the USDA's Assistant Secretaries for Marketing and Inspection Services and Science and Education, FDA's Commissioner, and EPA's Assistant Administrators for Pesticides and Toxic Substances and for Research and Development.[161] BSCC's charter aims to identify gaps in scientific knowledge, to facilitate cooperation among agencies in reviewing bioengineered products, and to serve as "a coordinating forum for addressing scientific problems, sharing information, and developing consensus."[162]

From its inception, BSCC has been troubled by disagreements among its members on complicated policy questions concerning the scope of regulation of biotechnology. These disagreements include whether some areas of biotechnology can be exempted from regulation, whether EPA's draft TSCA rule is appropriate, and how domestic and international regulation of biotechnology can best be coordinated.

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[160] Evans Interview, *supra* note 120.

[161] OSTP, Coordinated Framework for Regulation of Biotechnology; Establishment of the Biotechnology Science Coordinating Committee, 50 Fed. Reg. 47,174, 47,176 (1985).

[162] *Id.*

1. The Regulatory Exemption Controversy

One of the most controversial issues has been whether some bioengineered organisms can be exempt from regulation and, if so, under what definition. In the 1986 Coordinated Framework policy statement, BSCC proposed that agencies should not consider an organism to be "intergeneric" or a "pathogen" (and hence subject to regulation) if it resulted from the addition of intergeneric material that is "well-characterized and contains only non-coding regulatory regions."[163] BSCC's effort to exclude certain organisms met with a mixed reaction. Researchers and industry representatives protested that BSCC should have proposed more exemptions from regulation.[164] Environmentalists argued that there was no scientific justification for the exclusions that BSCC did create.[165] By taking their case to court, they forced BSCC in late 1986 to state that the definitions were not binding on any of the regulatory agencies that had participated in writing them.[166]

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[163] OSTP, Coordinated Framework for Regulation of Biotechnology, 51 Fed. Reg. 23,302, 23,307 (1986). An organism is "intergeneric" if it consists of a deliberate combination of genetic material from sources in different genera. *Id.* at 23,306. A pathogen is a "virus or microorganism" that has the "ability to cause disease in other living organisms." *Id.* at 23,307.

The basis of the exclusion was that well-characterized noncoding regulatory regions have "no coding capacity for the production of any gene product" and therefore do not "promote the production of any new material." *Id.* at 23,307 n.2. In other words, noncoding regulatory sequences were understood to be like a police officer who controls the "amount" of traffic allowed to move in any given direction over time, but generally cannot reverse the traffic's flow, direction, or its composition of cars, cycles, and trucks. *See* EPA, Statement of Policy; Microbial Products Subject to the Federal Insecticide, Fungicide, and Rodenticide Act and the Toxic Substances Control Act, 51 Fed. Reg. 23,313, 23,326-27 (1986). For this reason, the BSCC had decided that "the probability of any incremental hazard compared to the unmodified organism host is low." OSTP, Coordinated Framework for Regulation of Biotechnology, 51 Fed. Reg. 23,302, 23,307 (1986).

[164] *See, e.g., Regulatory Tangle Snarls Agricultural Research in Biotechnology Arena,* 234 SCI. 275-76 (1986). Researchers and industry also charged that BSCC failed to reach agreement on other key regulatory terms such as "environmental release." *Id.*

[165] *Id.* EPA's scientific staff also opposed the exclusion from regulation of noncoding regulatory regions. *What Did EPA Know and When Did They Know It,* Genetic Engineering Letter, Nov. 24, 1986, at 3. "[T]op EPA officials overruled the fears of agency scientists in approving an exemption for a broad class of genetically engineered microbes from the proposed federal regulations." *Id.*

[166] The suit against OSTP was filed by the Foundation on Economic Trends, Jeremy Rifkin's organization. It alleged that the government had authorized the environmental release of "certain types of genetically engineered organisms without significant review by federal agencies of their environmental or public health impacts." Foundation on Economic Trends v. Johnson, Civ. No. 86-1956 (D.D.C. filed July 15, 1986), *cited in* J. GIBBS, I. COOPER & B. MACKLER, *supra* note 83, at 133. After BSCC responded that the definitions were not binding, OSTP, Biotechnology Science Coordinating Committee; Meeting, 51 Fed. Reg. at 44,397, the

BSCC's proposal for regulatory exclusions was dealt another blow in October 1987 when a House committee charged that the chairman of BSCC, David Kingsbury, was a director of a biotechnology company at the time he helped write the BSCC definitions.[167] Although Kingsbury protested that he had merely "served as a consultant" to the predecessor of a biotechnology company prior to joining NSF,[168] he resigned as chairman in October 1988.[169] The allegations against Kingsbury and his subsequent resignation suggested that BSCC's decision to recommend regulatory exclusions may have been the product of a conflict of interest by its chairman.

2. *The TSCA Rule*

In 1988, BSCC definitions became a source of contention between EPA and other members of BSCC. In May 1988, EPA informed BSCC that its draft TSCA rule would require regulation of "non-coding regulatory sequences" whenever the modification involved a pathogen.[170] Upon learning EPA's intent, the BSCC chairman immediately wrote to the President's Office of Management and Budget (OMB) to request that OMB withhold clearance of EPA's proposed rule until the "other committee members could review the proposed rule from a scientific perspective."[171]

After reviewing the proposal, the other BSCC members were generally critical.[172] FDA, for example, concluded that "[n]either scientific principles nor experience argue for the need for [EPA's proposed] regulation."[173] Some members went further. FDA's representative and BSCC

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district court dismissed the Foundation's lawsuit. Foundation on Economic Trends v. Johnson, Civ. No. 86-1956, slip op. at 5 (D.D.C. 1986), *cited in* J. GIBBS, I. COOPER & B. MACKLER, *supra* note 83, at 134.

[167] Gladwell, *Panel Probes White House Biotech Aide,* Wash. Post, Oct. 16, 1987, at F1; *Around the Agencies,* Nat'l J., Oct. 22, 1988, at 2685; *see* Fox, *The U.S. Regulatory Patchwork,* 5 BIO/TECHNOLOGY 1273, 1274 (1987).

[168] McGraw-Hill's Biotechnology Newswatch, Nov. 2, 1987, at 5. The National Science Foundation carried out its own investigation and "determined that no immediate administrative action would be appropriate." *Id.*

[169] *Around the Agencies,* Nat'l J., Oct. 22, 1988, at 2685.

[170] Memorandum from John A. Moore, Assistant Administrator for Pesticides and Toxic Substances, EPA, to Members, BSCC, at 3 (May 24, 1988).

[171] Letter from James B. Wyngaarden, Chairman, BSCC, to James B. MacRae, Acting Administrator for Information and Regulatory Affairs, OMB (May 23, 1988). The first time that the BSCC considered the EPA draft rule was at its May 1988 meeting. *See* Letter from John A. Moore, Assistant Administrator for Pesticides and Toxic Substances, EPA, to James B. Wyngaarden, Chairman, BSCC (Apr. 12, 1988).

[172] *See, e.g.,* Letter from Frank E. Young, Commissioner, FDA, to John A. Moore, Assistant Administrator for Pesticides and Toxic Substances, EPA (July 5, 1988) [hereinafter Young Letter]; Letter from William J. Garland, Director, NIH, to John A. Moore, Assistant Administrator for Pesticides and Toxic Substances, EPA (June 6, 1988).

[173] Young Letter, *supra* note 172. FDA complained that EPA had ignored the "well established principle that the degree of government regulation should be commensurate with

legal counsel recommended that the general counsels of the other BSCC members should attempt to redraft EPA's rule into a more acceptable form.[174]

Over the summer of 1988, EPA's staff met with the staff of other BSCC member agencies in an attempt to win them over.[175] EPA had little success, however, perhaps because it stoutly defended its draft rule.[176] For example, it rejected FDA's contention that regulation of "non-coding regulatory sequences" was "unscientific" on the grounds that "credible scientific societies" opposed FDA's position that regulatory sequences should be exempted from regulation.[177]

In August 1988, Dr. Wyngaarden, the BSCC Chairman, conveyed to OMB that the other BSCC members opposed EPA's draft rule.[178] He

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the degree of risk posed by the product in question." *Id.* at 1. It alleged that EPA's draft "has moved toward a stiii broader scope of what is regulated" despite a "growing consensus that the newest techniques of genetic manipulation are extensions, or refinements, of the earlier ones (often providing more precise and better characterized genetic changes, with better predictability of behavior of the regulatory organisms)." *Id.* at 1-2. FDA also contended that EPA's "proposed approach covering virtually all research field trials seems to us likely to inhibit R&D activities, and in the long term could have significant negative effects on U.S. innovation in this field." *Id.* at 2.

[174] At a July 11, 1988 meeting of OSTP's International Biotechnology Subcommittee, whose membership includes representatives of all of the BSCC member agencies, the BSCC counsel and FDA's representative recommended that "the General Counsels (GC) of all the concerned agencies should work on correcting the proposed rule." Memorandum from Elizabeth Milewski, Special Assistant on Biotechnology, EPA, to the Record, at 4 (undated) (report on the discussion of the International Biotechnology Subcommittee of the Life Sciences Committee). FDA's representative said that he would "ask FDA's GC to look at the proposed rule." *Id.* at 7. USDA's representative warned that the proposal was "dangerous" because having "GCs from other agencies perform the task entrusted to EPA by Congress would erode EPA's authority." *Id.* at 4.

[175] *See* Letter from Terry Medley, Director, Biotechnology and Environmental Coordination Staff, APHIS, USDA, to Janet Dorigan, Senior Policy Analyst, Executive Office of the President (June 21, 1988) (concerning meeting with EPA staff); Memorandum from John A. Moore, Assistant Administrator for Pesticides and Toxic Substances, EPA, to James Wyngaarden, Chairman, BSCC (June 21, 1988) (concerning discussions and EPA staff meetings with staff from three BSCC member agencies).

[176] *See* Memorandum from John A. Moore, Assistant Administrator for Pesticides and Toxic Substances, EPA, to James Wyngaarden, Chairman, BSCC (June 21, 1988) (discussing EPA's responses to the criticisms of the other agencies).

[177] EPA complained that "[a] myth appears to have developed around this concept in the sense that any suggestion to review the exemption proposed in the 1986 policy statement is seen as unscientific." Letter from John A. Moore, Assistant Administrator for Pesticides and Toxic Substances, EPA, to Frank E. Young, Commissioner, FDA, at 4 (July 14, 1989). Moore explained that "it is well documented that credible scientific societies, including the American Society for Microbiology, Ecological Society of America, and our own Biotechnology Science Advisory Committee, feel the exclusion is without scientific foundation. Indeed, EPA was roundly criticized for including this exclusion as part of the 1986 policy statement." *Id.*

[178] OMB was informed that despite "extensive discussions" between BSCC members, "scientific concerns regarding the proposed rules remained" and that "[f]urther attempts at resolution of these scientific issues appear unlikely to produce consensus." Letter from James B. Wyngaarden, Chairman, BSCC, to Jay Plager, Administrator, Office of Information and Regulatory Affairs, OMB, at 1 (Aug. 19, 1988). The BSCC objected that the proposed rules

pointed to EPA's decision to include intergeneric organisms formed by noncoding regulatory regions as an example of EPA's intent to regulate "organisms scientifically considered to be of low risk."[179] EPA countered that Dr. Wyngaarden's letter "does not convey either the nature or the substance of the issues discussed in the BSCC."[180] According to EPA, "Dr. Wyngaarden states as fact that microorganisms formed by the addition of noncoding regulatory sequences from organisms in other genera are low risk. This is not a fact, but an opinion held by some."[181]

Despite making changes to its draft rule,[182] EPA was unable to obtain OMB's permission to issue a Notice of Proposed Rulemaking.[183] EPA reacted by indicating that its draft rule was publicly available and

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were "inconsistent with the conceptual basis of the Coordinated Framework" because they did not "use scientifically determined likelihood of risk bases for categories of regulated microorganisms." *Id.* at 1-2.

At the same time that EPA and BSCC were trying to influence OMB, other agencies and parties were also lobbying OMB. The Small Business Administration weighed in against EPA. Letter from Frank S. Swain, Chief Counsel for Advocacy, Small Business Administration, to Jay Plager, Administrator, Office of Information and Regulatory Affairs, OMB at 4 (Sept. 7, 1988) ("EPA's draft rule regulating microorganisms is burdensome and ill-conceived"). The Association of Biotechnology Companies (ABC) also voiced its complaints. Letter from Bruce F. Mackler, General Counsel, ABC, to C. Boyden Gray, Counsellor to the President (July 11, 1988).

[179] Letter from James B. Wyngaarden, Chairman, BSCC, to Jay Plager, Administrator, Office of Information and Regulatory Affairs, OMB, at 1 (Aug. 19, 1988).

[180] EPA argued that "[t]he example used by Dr. Wyngaarden to illustrate EPA's alleged failure to base its proposed rule on risk demonstrates how such uncertainties affected BSCC review and led to the failure of the BSCC process to come to grips with the issues involved in writing a functional rule." Letter from John A. Moore, Assistant Administrator for Pesticides and Toxic Substances, EPA, to Jay Plager, Administrator, Office of Information and Regulatory Affairs, OMB, at 1-2 (Aug. 30, 1988).

[181] *Id.* at 2. EPA noted that "many eminent and respected scientists have suggested that this type of manipulation may present a level of potential risk which places such microorganisms among those warranting a cautious approach." *Id.*

[182] Letter from John A. Moore, Assistant Administrator for Pesticides and Toxic Substances, EPA, to Jay Plager, Administrator, Office of Information and Regulatory Affairs, OMB (Sept. 23, 1988).

[183] At OMB's request, BSCC solicited and received comments on the revised EPA rules and they were still largely critical. *See, e.g.*, Letter from James B. Wyngaarden, Chairman, BSCC, to Janet Dorigan, Senior Policy Analyst, Executive Office of the President (Dec. 9, 1988); Letter from Kenneth A. Gilles, Assistant Secretary for Marketing and Inspection Services, USDA, to Janet Dorigan, Senior Policy Analyst, Executive Office of the President (Dec. 5, 1988); Letter from Frank E. Young, Commissioner, FDA, to Janet Dorigan, Senior Policy Analyst, Executive Office of the President (Dec. 2, 1988).

by soliciting comments on the proposal.[184] As of this writing, EPA has also refused to attend any further BSCC meetings.[185]

3. *International Spillover*

Disagreements between BSCC members have also had an international spillover. The State Department has consulted BSCC as an advisory committee concerning State's participation in the Organization for Economic Cooperation and Development (OECD) for issues relating to biotechnology.[186]

BSCC, however, was unable to function in this capacity due to internal discord, which resulted when the State Department referred to BSCC an OECD document that outlines a set of principles known as Good Development Practices (GDP).[187] GDP's would exempt small-scale field testing from case-by-case approval by regulatory authorities as long as researchers met predesignated safety requirements.[188] BSCC took up the matter at the same time its members were disputing the TSCA draft rule. The issue polarized the committee: officials from EPA and USDA disputed the scientific validity of the GDP principles, and officials from FDA defended them.[189]

Officials who participated in BSCC meetings believe that the United States has been embarrassed by its inability to agree on a timely response to the OECD draft, and each side of the debate blames the other for this result.[190] Worse, by not commenting on the OECD draft, the United States may have lost an opportunity to influence a recent initiative by the European Community to standardize the regulation of biotechnology research in Europe by 1992.[191] If the European Community adopts the GDP approach, and USDA and EPA reject it for this country, domestic regulation of research will be stricter than European regulation. This could discourage biotechnology companies from doing research in the United States and shift that research to Europe.

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[184] EPA, Microbial Pesticides and Biotechnology Products; Request for Comments on Regulatory Approach, 54 Fed. Reg. 7027 (1989). OMB protested this procedure. Letter from Jay Plager, Administrator, Office of Information and Regulatory Affairs, OMB, to John A. Moore, Assistant Administrator for Pesticides and Toxic Substances, EPA, at 2 (Nov. 29, 1988). EPA responded, "[I]f any sequence of activities are in conflict in your point of view, it is the fault of the review process at OMB." Letter from Lee M. Thomas, EPA, to Jay Plager, Administrator for Information and Regulatory Affairs, OMB (Dec. 5, 1988).

[185] Evans Interview, *supra* note 120.

[186] Fox, *supra* note 119, at 1380. The OECD issues recommendations to its members concerning how biotechnology should be regulated. *See, e.g.*, OECD, RECOMBINANT DNA SAFETY CONSIDERATIONS: SAFETY CONSIDERATIONS FOR INDUSTRIAL, AGRICULTURAL AND ENVIRONMENTAL APPLICATIONS OF ORGANISMS DERIVED BY RECOMBINANT DNA TECHNIQUES (1986).

[187] Fox, *supra* note 119, at 1380.

[188] *See infra* text accompanying notes 262-66.

[189] Letter from Frank E. Young, Commissioner, FDA, to John A. Moore, Assistant Administrator for Pesticides and Toxic Substances, EPA (July 5, 1988).

[190] Interview with Carl Mazza, Office of Toxic Substances, EPA, in Washington, D.C. (June 1, 1989) [hereinafter Mazza Interview]; Miller Interview, *supra* note 117.

[191] Mazza Interview, *supra* note 190; Miller Interview, *supra* note 117.

B. Reformulating BSCC

The demise of BSCC has left the White House without a method to assist agencies in coordinating their biotechnology activities. Since only the White House is in a position to bring the agencies together for that purpose, it must consider how to reactivate BSCC. This section analyzes why the BSCC failed and proposes ways to avoid similar failure in the future.

1. Where BSCC Went Wrong

BSCC was chartered to be "a forum for discussing scientific questions raised in regulatory and research applications and, thus, make available a wider understanding of emerging scientific questions and promote consistency in agency approaches."[192] David Kingsbury, the first BSCC chairman, vowed that BSCC had no intention of imposing on its members policy decisions reached by the committee. He told a Congressional committee that BSCC could confine itself to "scientific" questions and that it "would have no formal or informal contacts with OMB regarding agencies' proposed rules."[193] These assurances were given after an early OSTP proposal for regulatory coordination was criticized for being duplicative of agency review.[194]

BSCC failed to keep Kingsbury's promises for two reasons. First, the original charter had assumed that BSCC would be able to distinguish scientific from policy issues. However, most regulatory questions are mixed questions of science and policy not easily separated into their scientific and policy components;[195] thus, it was improbable that BSCC could limit itself to "scientific" issues.[196] Whatever chance the committee had to function as a "scientific" committee was lost when OSTP appointed as its members high-level "political" appointees from the regulatory agencies.[197] Second, BSCC became embroiled in policy matters because it was lobbied to do so by industry and FDA. Those who opposed EPA's draft TSCA rule seized upon BSCC as a vehicle to stop EPA from adopting the rule.[198]

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[192] OSTP, Coordinated Framework for Regulation of Biotechnology; Establishment of the Biotechnology Science Coordinating Committee, 50 Fed. Reg. 47,174, 47,175 (1985).

[193] REGULATION OF BIOTECHNOLOGY, *supra* note 114, at 52 (summarizing the testimony of Dr. Kingsbury) (citation omitted).

[194] In 1984, OSTP had proposed a committee structure that required each regulatory agency to use scientific advisory committees and established a White House-level committee, called the Biotechnology Science Board (BSB), to review committee decisions. OSTP, Proposal for a Coordinated Framework for Regulation of Biotechnology, 49 Fed. Reg. 50,897, 50,904-05 (1984). OSTP received numerous comments that the ill-defined role of the BSB would result in duplicative and time-consuming review of applications before the regulatory agencies. *See, e.g., Regulatory Muddle Somewhat Clearer, But AHI Says Much Confusion Remains*, AGRICULTURAL BIOTECHNOLOGY NEWS, Sept. 1985, at 4; *Tuning the Advisory Mechanism*, 3 BIO/TECHNOLOGY 279 (1985). The BSCC plan was OSTP's response to these complaints. J. GIBBS, I. COOPER & B. MACKLER, *supra* note 83, at 126-27.

[195] *See* Cheaper & McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 35-36 (1989).

[196] The BSCC's attempt to exclude from regulation microorganisms engineered with

The lesson to be drawn from BSCC's demise is that there are two types of interagency coordination that do not mix well. One type of coordination involves the identification of issues, exchange of information, and preparation of reports concerning issues common to several agencies. This was BSCC's original function. The other type of coordination involves the imposition of certain policies on agencies intended to move the Executive Branch in a unified and consistent direction. This was the function that BSCC tried to perform. The second function—requiring common policies—is inimical to the first function—exchanging information and data—because no agency will be anxious to cooperate with a process that threatens its independence.

2. *A Reorganized BSCC*

BSCC's attempt to dictate policy has caused two significant dislocations. First, the White House's coordination strategy has been delegitimized because OSTP and BSCC decisionmaking occurred behind closed doors, without public accountability.[199] Access to BSCC was uneven: some industry members were able to lobby BSCC members,[200] but other interested parties were excluded from participation.[201] Second, in addi-

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noncoding regulatory sequences illustrates this problem. Although reputable ecologists believe that such organisms may pose significant environmental risks, *see supra* note 177, the BSCC chairman told OMB that such organisms are "scientifically considered to be of low risk." *See supra* text accompanying note 179.

[197] *See supra* text accompanying note 161.

[198] Miller Interview, *supra* note 117; interview with Bruce Mackler, General Counsel, Association of Biotechnology Companies, in Washington, D.C. (May 31, 1989) [hereinafter Mackler Interview].

[199] *Biotechnology Science Coordination Act of 1986: Hearings Before the Subcomm. on Natural Resources, Agricultural Research, and Environment, and the Subcomm. on Science, Research, and Technology of the House Comm. on Science & Technology*, 99th Cong., 2d Sess. 35 (1986) (statement of David Kingsbury, Chairman, BSCC) (most of the BSCC activities are closed); interview with Margaret Mellon, Director, Biotechnology Project, Wilderness Society, in Washington, D.C. (May 9, 1989) (U.S. policy concerning international regulation of biotechnology is made by BSCC behind closed doors) [hereinafter Mellon Interview].

[200] Mackler Interview, *supra* note 198.

[201] *See, e.g., Coordinated Framework for Regulation of Biotechnology: Hearing Before the Subcomm. on Investigations and Oversight, the Subcomm. on Natural Resources, Agricultural Research, and Environment, and the Subcomm. on Science, Research, and Technology of the House Comm. on Science & Technology*, 99th Cong., 2d Sess. 74-75 (1986) (statements of Elliot Norse, Ecological Society of America) (BSCC sought scientific input only from genetic engineers and not ecologists in devising 1986 definitions).

tion, EPA's refusal to participate renders BSCC dysfunctional as a coordinating agent.

To overcome the BSCC legacy and to institute effective coordination between agencies concerning biotechnology, the White House must do three things. First, it should return BSCC to its original function of being a clearinghouse where agencies can meet, exchange information, and, if possible, reach a consensus about pending issues. The responsibility for establishing uniform government policies should be returned to OMB and other White House committees established for that purpose. Second, the White House should enlarge BSCC's mandate and membership to permit it to consider the broad sweep of policy issues created by biotechnology. Finally, the White House should require that BSCC meetings be open to the public on the same basis as meetings held under the Federal Advisory Committee Act.

As a clearinghouse, a reorganized BSCC could assist agencies in the coordination of their activities in several ways: by identifying scientific and policy issues relating to the government's regulation of biotechnology, by preparing reports concerning those issues, and by serving as a forum for the exchange of scientific data. In addition, BSCC could utilize committee reports as a vehicle for reaching interagency consensus. But to avoid the type of rancor that permeated the original BSCC and ended its usefulness, BSCC should avoid taking a position on the specific initiatives of its members. If a consensus on a committee report cannot be reached, BSCC should mitigate infighting by focusing its efforts on evaluating and developing a variety of options available to decisionmakers.

If the White House returned BSCC to a clearinghouse function, the responsibility for ensuring consistency among agencies would be moved back to OMB or other White House agencies, such as the Domestic Policy Council. OMB might object that it lacks the expertise to carry out these functions unless BSCC can advise it. BSCC should be free to advise OMB, but where its members are not in agreement the nature of its advice should be limited to identifying the options available to decisionmakers. While this procedure may not be as valuable to OMB as having BSCC take a position on the regulatory initiatives of its members, it seems less likely to cause the type of antagonisms that currently cripple BSCC.

Moreover, this division of labor has two advantages. First, because it has more legal and political authority, OMB is in a better position to require agencies to follow common policies. Second, OMB would not be able to avoid public scrutiny of its decisions by having OSTP do its work.[202]

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[202] *See* BRUFF, REPORT TO THE ADMINISTRATIVE CONFERENCE, PRESIDENTIAL MAN-

Besides returning BSCC to a clearinghouse function, the White House should enlarge its mandate to include three types of additional issues important to the development and regulation of biotechnology. First, BSCC should address the major economic issues that affect biotechnology, such as patent protection, technology transfer, and international trade rules. Government decisions concerning these issues may affect the biotechnology industry to the same, or a greater extent, than the resolution of regulatory issues.[203] Second, BSCC should consider the social impact of biotechnology, including the implications of agricultural biotechnology for family farming and rural development.[204] BSCC could serve a useful function in this area by helping agencies anticipate and understand the consequences of their actions for society. Finally, BSCC should also assist agencies in the coordination of biosafety research and funding. As the next section explains, the coordination of biosafety research and funding is an important element in developing a more efficient regulatory system.

If the mandate of BSCC is enlarged, its membership must also be enlarged.[205] At the present time, several departments or agencies that make decisions relevant to biotechnology, such as the Agency for International Development, the Commerce Department, the Department of Defense, and the Department of Health and Human Services, are not represented on BSCC.[206] Surprisingly, not even all of the agencies that directly regulate biotechnology are represented on BSCC.[207] For in-

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AGEMENT OF AGENCY RULEMAKING, at VII 9-10 (Nov. 21, 1988).

[203] Interview with David Bayer, Vice President, Genetech, in Washington, D.C. (June 14, 1989) [hereinafter Bayer Interview].

[204] *See* C. HASSEBROOK & G. HEGYES, *supra* note 17, at 4-7.

[205] OSTP could reorganize BSCC under the Federal Coordinating Council for Science, Engineering, and Technology (FCCSET), 42 U.S.C. § 6651 (1982), as it did the original BSCC. FCCSET is chaired by the Director of OSTP and is composed of representatives of agencies and departments with science, engineering, and technology programs. Its function is to plan, identify research needs, eliminate duplication, and further international cooperation for those programs. *Id.* §§ 6651(b), (e). FCCSET membership may be augmented as necessary. *Id.* § 6651(d). OSTP is authorized to appoint subcommittees "[f]or the purpose of conducting studies and making reports." *Id.* § 6651(h).

[206] The Agency for International Development is responsible for international protection of biological diversity (the raw materials of biotechnology) and international development. Adler, *Biotechnology: The U.S. Needs an Integrated Policy,* 24 FORUM 3 (June 1986). Commerce has responsibility for the Patent and Trademark Office, which controls patent protection for biotechnology products, and the Export Administration, which addresses international trade issues. *Id.* DOD funds biological warfare research. *See Department of Defense Safety Programs for Chemical and Biological Warfare Research: Hearings Before the Subcomm. on Oversight and Government Management of the Comm. on Government Affairs,* 100th Cong., 2d Sess. (1988). The Department of Health and Human Services is responsible for setting reimbursement policies for government-funded medical care, which affects the research incentives of genetically engineered drugs. Bayer Interview, supra note 203 (pricing decisions affect incentives of pharmaceutical companies to do biotechnology research and development).

[207] *See* 5 U.S.C. § 552(b) (1988) (exclusion of agencies).

stance, OSHA, which regulates the exposure of workers to microorganisms, has been excluded.[208]

Finally, BSCC meetings should be open to the public on the same basis as meetings held under the Federal Advisory Committee Act.[209] Thus, meetings would be open unless they involved the exchange of confidential information such as draft agency rules that have not yet been published.[210] Draft copies of BSCC reports should be available to the public before they are discussed. An open process would enable BSCC both to legitimize its reports and to obtain public input.[211]

A revitalized BSCC can serve as the government's coordinating agent for biotechnology development, regulation, and biosafety research and funding. The new BSCC should be able to avoid the type of interagency infighting that led to EPA's withdrawal so long as its role is limited to factfinding, reporting, and serving as a clearinghouse for information relating to biotechnology. It should also be able to assist all government agencies concerned with biotechnology to coordinate their efforts if its mission and memberships are enlarged to permit it to function for that purpose.

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[208] *See* OSHA, Agency Guidelines on Biotechnology, 51 Fed. Reg. 23,347 (1986).

[209] Federal Advisory Committee Act, 5 U.S.C. app. § 10(a)(1) (1988); *see also* H.R. 4452, 99th Cong., 2d Sess. § 104(b) (1986) (would mandate open meetings of BSCC); REGULATION OF BIOTECHNOLOGY, *supra* note 114, at 89 (recommending open meetings of BSCC at the earliest opportunity).

[210] Advisory committee meetings must be open unless the information to be discussed would not have to be released under the Freedom of Information Act (FOIA). Federal Advisory Committee Act, 5 U.S.C. app. § 10(d) (1988). FOIA creates nine exceptions to the public disclosure of governmental information, 5 U.S.C. § 552(b)(1)-(9) (1988), including an exemption for "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency. *Id.* § 552(b)(5). This exemption creates a "deliberative process privilege," ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 603 (1985), which should protect the exchange of draft rules and other documents used by agencies to make decisions.

[211] Some persons might prefer that BSCC also have public members in order to obtain public input or technical expertise. *Cf.* McGarity, *Regulating Biotechnology*, 1 ISSUES IN SCI. & TECH. 40, 54 (1985) (committees that have a direct role in setting biotechnology policy should have public members). However, public members may not be necessary. Having open meetings and circulating drafts of its reports would give a reformed BSCC a means to obtain a wide variety of public views. Moreover, public members are not necessary to obtain expertise. BSCC can appoint scientific and policy experts from its member agencies to subcommittees. BSCC would be free, however, to add public members to its subcommittees to increase the scope of its input. If BSCC added public members, it would have to comply with the requirements of the Federal Advisory Committee Act (FACA), 5 U.S.C. app. § 10(a)(1) (1988). BSCC should comply with FACA on a voluntary basis in any case.

IV

IMPROVING REGULATORY METHODS: THE RISK ASSESSMENT AND RISK MANAGEMENT DEBATE

The third aspect in the design of a regulatory system for biotechnology involves the relationship between risk assessment and risk management. As discussed earlier, risk assessment is the use of scientific data to estimate the effects of exposure to hazardous materials or conditions.[212] Risk management involves selecting the most appropriate strategy to reduce hazards to the level required by an agency's mandate.[213] The two functions are connected because judgments about risk management are based on risk assessments. Those who perceive the risks to be significant tend to favor more stringent regulatory methods; those who perceive the risks to be less significant take the opposite position.

This section analyzes how the regulatory system for biotechnology can be designed to resolve the contending approaches to regulation. One approach is better identification and coordination of research that supports risk assessment. Another is the use of advisory committees, regulatory negotiation, and other consensus-building procedures to identify areas where agencies can adopt generic regulations or policy statements. Generic regulations would specify how an agency would resolve an issue each time it came up. Policy statements would specify what information or criteria an agency would use in resolving an issue.

A. Risk Assessment

Participants in the debate over the risks of released organisms have not been kind to each other. Critics of the 1987 NAS report, which downplayed the risks of released organisms,[214] dismiss it as an "unbolstered 'pamphlet'" that "buries cautionary environmental statements."[215] Critics of the OTA report, which calls for a cautious regulatory approach amounting to a case-by-case review,[216] describe it as a "ruinous corrupting lie" marked by "regulatory doublespeak."[217] If the regulation of biotechnology is to proceed effectively and efficiently, this contentiousness must be overcome. The BSCC episode surrounding EPA's TSCA rule indicates how decisions about risk management can easily become stalled by strong disagreements over risk assessment.

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[212] *See supra* text accompanying notes 25-37.

[213] Gillett, *supra* note 25, at 515, 516. Risk management depends on the findings of risk assessment, but it also considers technical, social, economic, and political concerns. *Id.* at 516.

[214] *See* NAS, 1987 REPORT, *supra* note 26.

[215] Fox, *supra* note 167, at 1276 (citing anonymous sources on Capitol Hill).

[216] *See* OTA, FIELD TESTING, *supra* note 1.

[217] Shuger, *How to Revolutionize Washington with 140 People*, THE WASH. MONTHLY, June, 1989, at 42 (citing anonymous academicians).

Both sides in the debate concede that they must have additional research before they can form a consensus. The 1987 NAS report recognizes "an urgent need for the scientific community to provide guidance . . . in evaluating planned introductions of modified organisms from an ecological perspective."[218] The ESA report recognizes a "pressing need" for interdisciplinary research.[219] A workshop convened by the American Association for the Advancement of Science and EPA also concluded that regulators require predictive risk assessment models for products of biotechnology, analogous to the models employed for predicting chemically induced effects.[220]

Unfortunately, some of the necessary research may not be forthcoming. USDA and EPA have been slow to fund research on the ecological effects of releasing microorganisms into the environment in the past. Federal budget constraints and the difficulty of reallocating existing funds currently stymie efforts to increase research support.[221] Given these problems, a reorganized BSCC could play an important role in developing the techniques and data necessary for assessing the risks of released organisms.[222]

First, the reformed BSCC could assist agencies in identifying ecological research needs and resource limitations. This effort would include helping agencies identify research projects that would permit biologists and ecologists to clarify and perhaps resolve their disagreements. Second, to avoid duplication and to ensure that research data is disseminated, BSCC could serve as a clearinghouse for the exchange of information by the agencies that fund this type of research. BSCC could also obtain information about the ecological research projects undertaken by foreign countries.

B. Risk Management

Most biotechnology products are now regulated on a case-by-case basis, while biotechnology research is regulated by a mixture of case-by-case and generic approaches. In a case-by-case approach, safety issues are resolved product-by-product. In a generic approach, the agency adopts rules to specify how it will resolve safety issues as they come up. The case-by-case approach provides more protection because the agency considers the safety of each product individually, but it can discourage innovation and product development because it is slower than the alternative generic approach.

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[218] NAS, 1987 REPORT, *supra* note 26, at 7.

[219] ESA Report, *supra* note 26, at 312.

[220] BIOTECHNOLOGY AND THE ENVIRONMENT: RISK & REGULATION 6-7 (A. Teich, M. Levin & J. Pace eds. 1985) (Proceedings of a Seminar Series conducted for EPA by the American Association for the Advancement Of Science). EPA's Science Advisory Board has reached the same conclusion. SCIENCE ADVISORY BOARD, EPA, ASSESSING EPA'S BIOTECHNOLOGY RESEARCH AND INFORMATION NEEDS: REPORT OF THE STUDY GROUP ON BIOTECHNOLOGY 4 (1986).

[221] McKenzie Interview, *supra* note 122; interview with Leslie Russell, Professional Staff, House Energy and Commerce Committee, in Washington, D.C. (May 8, 1989); interview with Kathleen Merrigan, Professional Staff, Senate Agriculture Committee, in Washington, D.C. (Apr. 26, 1989).

[222] Mazza Interview, *supra* note 190; interview with Greg Simon, Professional Staff, House Science and Technology Committee, in Washington, D.C. (May 8, 1989) [hereinafter Simon Interview].

1. Current Methods

a. EPA

EPA, USDA, and FDA all rely primarily on a case-by-case approach to the regulation of biotechnology. Each, however, could adopt generic rules applicable to certain situations.

EPA's regulation of pesticides is primarily case-by-case. Under FIFRA, each pesticide is reviewed individually.[223] Although EPA may waive some data requirements (or add new ones), it does so only on an individual basis.[224] EPA is authorized to exempt pesticides from registration if they do not pose a risk to the environment,[225] but it is unlikely to exempt any microbial pesticides any time in the near future.[226] Finally, although FIFRA authorizes EPA to exempt small-scale field trials from experimental use permit requirements,[227] the Agency has refused to apply this exemption to microbial pesticides. Instead, it permits researchers to submit less data for small-scale field trials than is required for an environmental use permit.[228]

EPA has drafted TSCA regulations that initially would also adopt a predominantly case-by-case approach.[229] As Table 5-1 indicates, EPA would exempt manufacturers from reporting some types of contained microorganisms,[230] but no exemption would exist for the environmental release of any microorganism until EPA listed it as exempt at a future time.[231] Moreover, unlike its approach to conventional chemicals, which exempts manufacturers from reporting "small quantities" of substances used for "scientific research,"[232]

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[223] *See generally* Comment, *EPA's Pesticides-in-Groundwater Strategy: Agency Action in the Face of Congressional Inaction,* 17 ECOLOGY L.Q. 143 (1990) (discussion of EPA registration and review of pesticides under FIFRA).

[224] 40 C.F.R. §§ 158.45(a)(2), 158.65(b)(1) (1988).

[225] FIFRA, 7 U.S.C. § 136w(b) (1988).

[226] J. GIBBS, I. COOPER & B. MACKLER, *supra* note 83, at 10.

[227] 40 C.F.R. § 172.3(a) (1988). EPA exempts field tests of conventional chemicals involving 10 acres or less of land surface or one surface-acre or less of water. *Id.* § 172.3(a)(1)-(2).

[228] EPA has two levels of reporting requirements for small-scale field trials. Level I, which applies to less risky microbial pesticides, requires the applicant to submit less information than Level II, which applies to more risky products. EPA, Statement of Policy; Microbial Products Subject to the Federal Insecticide, Fungicide, and Rodenticide Act and the Toxic Substances Control Act, 51 Fed. Reg. 23,313, 23,321-22 (1986). After receiving this information, EPA decides whether to require the applicant to apply for an experimental use permit. *Id.* at 23,321, 23,323.

[229] Although EPA has not yet proposed a rule, it has made public a draft rule now under consideration. *See* EPA DRAFT RULE, *supra* note 132.

[230] Intrageneric microorganisms would be exempted from reporting, if they were con-

TABLE 5-1
EPA'S DRAFT TSCA RULE REPORTING REQUIREMENTS FOR BIOENGINEERED COMMERCIAL PRODUCTS

	Microorganisms Produced in Contained System	Microorganisms Released in the Environment
Intergeneric (new)	reporting required	reporting required
Intergeneric (previously registered with EPA)	none	reporting required until EPA lists as exempt
Intrageneric	none	reporting required until EPA lists as exempt

Source: EPA, Draft Proposed Rule, Microbial Products of Biotechnology; Proposed Amendment to Require User Fees; Premanufacturer Notification Requirements; Designation of Significant New Uses, (Dec. 1, 1988), at 15.

EPA's proposal for biotechnology research does not have an automatic small-quantity exemption for the release of intergeneric organisms.[233] Instead, as Table 5-2 indicates, commercial researchers would be required to submit a TSCA Experimental Release Application

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tained. A system is "contained" if it is one for which the NIH has established a containment guideline or one for which certain conditions are met that would prevent the escape of microorganisms, including a requirement that the microorganism is used in "a closed vessel system that physically separates the fermentation process from the environment and from which the microorganism is not deliberately released to the environment." EPA Draft Rule, *supra* note 132, at 162-63.

Intergeneric microorganisms that are "inventoried" would also be exempt. *Id.* at 11. Under TSCA, a "new" chemical substance is defined as one that EPA has not placed on an "inventory" of chemical substances. 15 U.S.C. § 2602(9) (1988). EPA is to place a chemical substance on the inventory once it receives a premanufacturing notice concerning that substance. *Id.* § 2607(b).

[231] EPA Draft Rule, *supra* note 132, at 167.

[232] 40 C.F.R. § 720.36 (1988); *see* 15 U.S.C. § 2604(h)(3) (1988). EPA has defined "small quantities" as those quantities that are "not greater than reasonably necessary for [research and development] purposes." 40 C.F.R. § 720.3(cc) (1988).

[233] EPA Draft Rule, *supra* note 132, at 44-46. The legality of EPA's position is open to challenge. *See supra* text accompanying notes 134-36.

(TERA) requiring less data than a manufacturer must submit for a new chemical substance. The TSCA Experimental Release Application would be submitted to EPA or to a local Environmental Biosafety Committee (EBC) unless EPA had exempted the research based on previous experience with similar field trials.[234]

TABLE 5-2

EPA'S DRAFT TSCA RULE REPORTING REQUIREMENTS FOR SMALL-SCALE COMMERCIAL BIOTECHNOLOGY RESEARCH

	Microorganisms Produced in Contained System	Microorganisms Released in the Environment
Intergeneric (new)	none	TERA, or EBC only, until EPA lists as exempt
Intergeneric (inventoried)	none	TERA, or EBC only, until EPA lists as exempt
Other	none	none

Source: EPA, DRAFT PROPOSED RULE, MICROBIAL PRODUCTS OF BIOTECHNOLOGY; PROPOSED AMENDMENT TO REQUIRE USER FEES; PREMANUFACTURE NOTIFICATION REQUIREMENTS; DESIGNATION OF SIGNIFICANT NEW USES (Dec. 1, 1988), at 15.

b. USDA

USDA regulates biotechnology research by a generic approach and biotechnology products by a case-by-case approach. Recipients of USDA funding are required to comply with the NIH guidelines for biotechnology research,[235] which prescribe different levels of safety precautions for the physical containment of organisms.[236] USDA is drafting a second set of guidelines for research outside of contained facilities.[237] The guidelines classify organisms into safety categories and require compliance with applicable safety precautions. They also mandate either notification to, or approval by, USDA or an Institutional Biosafety Committee before any environmental release.[238]

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[234] EPA DRAFT RULE, *supra* note 132, at 47-72. *Compare id.* at 171-76 (proposed data requirements for products), *with id.* at 187-90 (proposed data requirements for a TSCA Experimental Release Application). The Environmental Biosafety Committees (EBC) would be modeled on NIH's Institutional Biosafety Committee (IBC) program. *See supra* note 86 and accompanying text. The EBC's would have both technical and public members and would provide local review of proposed experiments. In some cases, EBC's would serve as advisory committees for EPA, and in others, they would decide whether an experiment could proceed. EPA DRAFT RULE, *supra* note 132, at 51-62, 185-224.

[235] *See supra* note 106 and accompanying text.

[236] These precautions, known as biosafety levels, require appropriate standard microbiological practices, special practices, containment equipment, and laboratory facilities appropriate for each of four different degrees of containment. *See* NIH, Guidelines for Research Involving Recombinant DNA Molecules, 51 Fed. Reg. 16,960 (1986). NIH determines whether a researcher is in compliance with the relevant biosafety level for some experiments,

By comparison, USDA product regulation by the Animal and Plant Health Inspection Service and the Food Safety Inspection Service is largely case-by-case. APHIS makes individual determinations of whether an organism can damage plants,[239] although it has promulgated varying levels of data requirements to indicate the safety of contained and released plant pests.[240] It has also issued a rule that prescribes packaging and labeling procedures for shipping plant pests.[241] APHIS's regulation of animal vaccines is likewise case-by-case,[242] although the Service varies the intensity of its screening process depending on the risk classification of a given vaccine.[243] Finally, the Food Safety Inspection Service (FSIS) inspects meat and poultry products altered by biotechnology on a product-by-product basis.[244]

c. *FDA*

FDA also reviews the "intended use of each [biotechnology] product on a case-by-case basis."[245] To address recurring drug and biological

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but others are approved by an Institutional Biosafety Committee. *Id.*

[237] *See* Draft USDA Guidelines for Research with Genetically Modified Organisms Outside of Contained Facilities (May 1, 1989).

[238] *Id.* at 6-19.

[239] See 7 C.F.R. § 340.1 (1988) for a definition of "regulated article." Although APHIS has published a list of organisms that are or contain plant pests, *id.* § 340.2, it will still determine on a case-by-case basis whether an organism that contains any part of a plant on this list is itself a plant pest. APHIS also regulates any unclassified organism, organism of unknown classification, or any other genetically engineered organism if it "has a reason to believe it is a plant pest." *Id.*

[240] For release into the environment, an applicant must submit detailed scientific information concerning the nature of the regulated article, the system used to produce it, the purpose of introduction, the quantity, release procedures and safeguards, destination, uses, and distribution. *Id.* § 340.3(a)(1)-(14). Only some of this information is required for a permit to move a pest in interstate commerce. *Id.* § 340.3(c).

[241] *Id.* §§ 340.5-.6 (defining proper labeling and packaging of plant pests).

[242] Medley, *Issues in Assessing the Environmental Impact of Veterinary Biologics Produced Through Biotechnology*, 43 FOOD DRUG COSM. L.J. 821, 825 (1988).

[243] APHIS utilizes three risk classifications for screening animal vaccines. *See* USDA, Final Policy Statement for Research and Regulation of Biotechnology Processes and Products, 51 Fed. Reg. 23,336, 23,339 (1986) [hereinafter USDA Policy Statement].

[244] The Food Safety Inspection Service (FSIS) regulation consists of two elements. First, FSIS regulations prohibit animals used in research concerning experimental animal drugs, biologics, or chemicals from being slaughtered for food until the owner demonstrates their safety. 9 C.F.R. §§ 309.17, 381.75 (1988). Second, FSIS plans to subject animals that are bred using new biotechnology techniques to the same inspection procedures it uses for traditionally inspected animals. USDA Policy Statement, *supra* note 243, at 23,343.

[245] FDA, Statement of Policy for Regulating Biotechnology Products, 51 Fed. Reg. 23,309, 23,310 (1986).

issues, FDA issues policy statements called "Points to Consider" documents.[246] FDA does have a method for exempting some biotechnology food products from case-by-case review,[247] but it has not yet decided the extent to which it will allow exemptions.[248] Although EPA, APHIS, and FDA can adopt generic regulations, and have done so to a limited extent, their approach to regulation is overwhelmingly case-by-case. Their failure to utilize a more generic approach is explained by the fact that the agencies find themselves in the middle of a political battle over competing theories of risk management.

2. *Competing Theories of Risk Management*

Biotechnology firms and environmental groups react differently to the current pattern of regulation. While acknowledging the need for regulation, the firms warn that overly burdensome and unpredictable regulation will mean the loss of American leadership in biotechnology.[249] Firms generally favor the rapid adoption of generic rules that would create exemptions for some organisms and some types of research.[250] Environmentalists counter that because so little is known about the effects of releasing organisms into the environment, all products and research should be screened individually until experience indicates which are safe.[251]

The controversy over EPA's draft TSCA rule illustrates these opposing approaches to risk management. EPA's existing approach exempts nonpathogenic organisms and organisms engineered from well-characterized noncoding regulatory regions.[252] By comparison, EPA's proposed draft rule (see Table 1) would not allow exemptions from TSCA's reporting requirements for noncontained organisms, although it states an intention to compile a list of exempt organisms and their uses, should experience indicate that reporting is no longer required.[253] As EPA now rewrites its draft rule, it must decide whether it will retain case-by-case review or create exemptions for certain organisms or research projects. EPA must also determine whether it will form institutional review committees. Because other regulatory agencies will be confronted by the same issues, the fight over EPA's TSCA rule illustrates the nature of the disagreement over how biotechnology should be regulated.

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[246] *See* J. Gibbs, I. Cooper & B. Mackler, *supra* note 83, at 116; *see, e.g.*, Food Drug Cosm. L. Rep. (CCH) 1-2 (July 5, 1989) (NIH request for comments on "Points to Consider in the Design and Submission of Protocols for the Transfer of Recombinant DNA into Human Subjects").

[247] A substance is regulated as a "food additive" unless it is GRAS [generally recognized as safe] or "generally recognized, among experts . . . as having been . . . shown . . . to be safe under the conditions of its intended use." 21 U.S.C. § 321(s) (1988); 21 C.F.R. §§ 170.3(e), 170.30 (1989). Genetic manipulation of plants or animals may be GRAS if the altered plant or animal is sufficiently similar or identical to a traditionally produced product that additional safety testing is unnecessary. *See* Mahinka & Sanzo, *Biotechnology Litigation and Federal Regulation: Status and Implications*, 42 Food Drug Cosm. L.J. 500, 503 (1987).

[248] Interview with Jim Maryanski, Division of Food Safety and Applied Nutrition, FDA, in Rockville, Md. (June 2, 1989).

[249] Mackler Interview, *supra* note 198. Industry points to the drop in stock prices for many biotechnology companies and the bankruptcy of others as evidence that regulation is currently too restrictive. *See* Pollack, *Farm Gene Makers' Money Woes*, N.Y. Times, Apr. 24, 1989, at D1, col. 3. These problems, however, can also be attributed to the unanticipated difficulties that industry has had in developing products with commercial potential. *See* J. Kloppenburg, Jr., *supra* note 15, at 202.

[250] *See infra* text accompanying notes 257-58.

[251] *See infra* text accompanying notes 254-56.

[252] EPA proposed eliminating the first exemption because its BSAC advised the Agency that "it would be difficult to write a clear, precise, simple-to-understand definition of pathogen

The OTA and ESA risk assessment studies discussed earlier support EPA's cautious approach.[254] These studies recommend that regulatory agencies develop a system of categories or guidelines for releases requiring a minimum degree of screening and review. These categories would then be progressively developed and refined based on experience from field testing and other ecological research.[255] For this reason, the Environmental Defense Fund endorsed EPA's plan as "scientifically sound."[256]

Industry and other government agencies, however, are critical of EPA's effort to abandon its current exemptions. As discussed earlier, BSCC voted to oppose EPA's proposed draft rule. BSCC contended that nonpathogens and noncoding regulatory regions should be exempt because scientists agree they present low risks.[257] One biotechnology company complained that "EPA exemptions from review are cosmetic" and that the draft rule is "even more complex and stifling than previous regulations proposed by EPA."[258]

EPA also decided to require case-by-case review for commercial research.[259] It attempted to lessen the regulatory burden on researchers by proposing to reduce reporting requirements and paperwork and to

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which would function well for regulatory purposes." Memorandum from John Moore, Assistant Administrator for Pesticides and Toxic Substances, EPA, to BSCC Members, at 2 (May 24, 1988); *see also* EPA DRAFT RULE, *supra* note 132, at 7, 107. It proposed eliminating the second exemption because a "sufficient degree of uncertainty was associated with modifications of regulatory regions in general to indicate that review is appropriate at some stage." *Id.*

[253] EPA DRAFT RULE, *supra* note 132, at 7, 10; *see also supra* text accompanying notes 229-33.

[254] *See supra* text accompanying notes 65-81.

[255] OTA, FIELD TESTING, *supra* note 1, at 23-24; ESA Report, *supra* note 26, at 310.

[256] Letter from Rebecca Goldburg, Staff Scientist, EDF, to Elizabeth Milewski, Special Assistant on Biotechnology, EPA, at 1 (Dec. 16, 1988) [hereinafter EDF Letter].

[257] *See supra* note 179 and accompanying text.

[258] Letter from Winston J. Brill, Vice President, Research and Development, Agracetus, to Charlene Dunn, Office of Toxic Substances, EPA, at 1 (Dec. 15, 1988) [hereinafter Agracetus Letter].

[259] *See supra* note 233 and accompanying text.

shorten its review period.[260] EPA describes this approach as falling between the option of exempting field research and requiring full compliance with the notification requirements of TSCA.[261] It poses less of a burden on researchers but still permits EPA to monitor field research.

FDA argues that EPA should instead adopt a system of safety rules similar to the Good Developmental Practices being proposed by the Organization of Economic Cooperation and Development in which the United States participates.[262] The GDP would exempt from review releases that meet certain low-risk criteria.[263] The State Department is also pressuring EPA, claiming that EPA's failure to adopt the GDP approach runs "counter to the position on biotechnology regulation that the United States Government has been advocating in various international fora and would likely impact our international competitive position adversely."[264]

EPA answers that it does not have sufficient information on the environmental effects and potential uses of microorganisms to develop practical containment standards for releases.[265] It rejects the concept that exemptions can be based on the quantity or scale of a release because even a low number of microorganisms can adversely affect the environment.[266]

EPA proposes to reduce the regulatory burden on researchers by allowing local Environmental Biosafety Committees (EBC's) based in the institutions conducting such research to approve certain types of activities.[267] For other research, the local EBC would advise EPA, but the Agency would retain decisionmaking authority. EPA hopes that forming EBC's will also enlist the help of the scientific community, ensure public participation in the regulatory process, and encourage development of local biotechnology data bases.[268] In addition, EPA views the EBC as a "neutral party" that could more effectively represent local public interests without interference from Washington-based scientists and bureaucrats.[269]

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[260] *See supra* note 234 and accompanying text.

[261] Mazza Interview, *supra* note 190.

[262] Letter from Frank E. Young, Commissioner, FDA, to John A. Moore, Assistant Administrator for Pesticides and Toxic Substances, EPA, at 2 (July 5, 1988).

[263] These would be based on the nature of the hazard, its use, and the extent of exposure. Mazza Interview, *supra* note 190.

[264] U.S. DEPARTMENT OF STATE, BUREAU OF OCEANS AND INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, INFORMAL COMMENTS OF THE DEPARTMENT OF STATE ON EPA PROPOSAL TO REGULATE MICROORGANISMS UNDER AUTHORITY OF TSCA 3 (July 7, 1988) (the proposed regulations would establish a complex new bureaucracy and would require a detailed case-by-case determination).

[265] EPA DRAFT RULE, *supra* note 132, at 41.

[266] *Id.* at 42.

[267] *See supra* note 234 and accompanying text.

[268] EPA DRAFT RULE, *supra* note 132, at 51-52.

[269] Letter from John A. Moore, Assistant Administrator for Pesticides and Toxic Sub-

EPA's enthusiasm for the EBC concept is not widely shared. Its biotechnology advisory committee gave the proposal only a qualified endorsement.[270] Everyone else has criticized it. The Environmental Defense Fund predicted that EBC's would become dominated by individuals with a vested interest in the research being reviewed[271] while industry predicted they would become dominated by opponents of biotechnology.[272] Industry also contends that using EBC's would produce inconsistent decisions, create duplicative review, and cause leaks of confidential business information.[273] Finally, the National Science Foundation is concerned that since most universities already have Institutional Biosafety Committees to comply with NIH's requirement, they would be unnecessarily burdened if they also had to set up EBC's.[274]

3. *Resolving Contending Approaches*

The reaction to EPA's TSCA rule indicates how little agreement exists concerning the appropriate design for risk management. This lack of agreement reflects the lack of consensus about risk assessment. To use generic methods, an agency must have sufficient data about a product or type of research so that it can frame applicable general rules. When information is lacking, an agency has no choice but to proceed on a case-by-case basis.[275]

The Administrative Conference, a federal agency that recommends ways to improve the regulatory process, has endorsed the use of generic rules for regulating carcinogens as long as agencies proceed cautiously in view of the "complexity and uncertainty of the issues involved."[276] Simi-

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stances, EPA, to Jay Plager, Administrator, Office of Information and Regulatory Affairs, OMB, at 7 (Aug. 30, 1988).

[270] EPA's Biotechnology Safety Advisory Committee (BSAC) supports the idea of local review, but it warned that the EBC concept as proposed may not be workable. Report from BSAC Considering the TSCA Proposed Rule 6-7 (Jan. 9, 1989). The problems identified by BSAC concerned potential jurisdictional disputes among EBC's, mechanisms for appeal of EBC decisions to EPA, adequacy of the public notice and review process, and protection of confidential business information. *Id.* It suggested that EPA might expend more effort guiding and monitoring EBC's than it would to conduct all TSCA Experimental Release Application reviews. *Id.* It recommended that EPA use other types of local review boards such as regional committees established in conjunction with each EPA Regional Office, or statewide committees established through Governors' offices. *Id.*

[271] EDF Letter, *supra* note 256, at 2.

[272] *See, e.g.*, Agracetus Letter, *supra* note 258, at 1.

[273] Comments of the Industrial Biotechnology Association on EPA's Approach to Regulating Biotechnology Under TSCA 12-13 (May 15, 1989).

[274] National Science Foundation, Comments on Draft Version of Proposed Rules for Regulating Certain Microbial Products of Biotechnology Under Toxic Substances Control Act 2 (June 7, 1988) (W.F. Harris).

[275] The choice of methods is also related to degree of risk. Since the case-by-case method permits an agency to take all individual circumstances into account, it may be more appropriate for the regulation of significantly dangerous risks.

[276] ACUS, Federal Regulation of Cancer-Causing Chemicals, 1 C.F.R. § 305.82-5 (1988)

larly, agencies could rely on generic rules for regulating biotechnology when appropriate. If generic rules can be used to forestall repetitive disputes in case-by-case proceedings, the public will be well served. In light of the disagreement concerning the risks of environmental releases, however, agencies should be careful to rest generic rules only on those scientific principles for which a consensus exists.

Several agencies have relied on negotiated rulemaking for drafting the text of proposed regulations in the past few years. Regulatory negotiation may assist agencies in adopting generic regulations, but agencies must be careful to use it only for appropriate issues.[277] Regulatory negotiation is unlikely to succeed where fundamental value conflicts prevent negotiation over the outcome or where a matter involves so few issues that tradeoffs between parties are impossible.[278] An example of an inappropriate topic is the issue of whether EPA should exempt well-characterized noncoding regulatory regions from TSCA's reporting requirements. On the other hand, regulatory negotiation may be very useful for less controversial topics such as designing the role, functions, and makeup of EPA's proposed EBC's.[279] In fact, EPA has hired the Conservation Foundation to determine whether mediation concerning EBC's is feasible.[280]

Another Administrative Conference recommendation for regulating carcinogens, which is appropriate for biotechnology, is that agencies develop "systematic statements" of the principles they will apply in risk assessment and management.[281] FDA's "Points To Consider" documents, which give specific and detailed guidance to drug and biological manufacturers concerning what information the agency needs to resolve in recurring scientific issues, already use this technique for regulating biotechnology.[282]

The use of policy statements would also mitigate one of the primary disadvantages of a case-by-case approach. Under a case-by-case approach, regulated entities and other interested parties often have a limited basis for predicting what principles an agency will use to resolve future cases. This is particularly true when the agency does not publish a

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[hereinafter Recommendation 82-5].

[277] Perritt, *Analysis of Four Negotiated Rulemaking Efforts*, in ACUS, RECOMMENDATIONS AND REPORTS 677-745 (1985). The idea has received a strong endorsement from the Administrative Conference. *See* ACUS, Procedures for Negotiating Proposed Regulations, 1 C.F.R. §§ 305.85-5, 305.82-4 (1988).

[278] *See* Harter, *Negotiating Regulations: A Case of Malaise*, 71 GEO. L.J. 1, 42-52 (1982); *see also* Perritt, *supra* note 277, at 671-75.

[279] *See, e.g., supra* text accompanying notes 267-74 (EPA proposes to enlist local EBC's to approve certain activities).

[280] Interview with Anne Hollander, Associate, The Conservation Foundation, in Washington, D.C. (June 1, 1989).

[281] *See* Recommendation 82-5, *supra* note 276.

[282] *See supra* note 246 and accompanying text.

complete explanation of its actions or when its explanation is not widely available.[283] Policy statements would enable industry and others to better anticipate agency action. Moreover, unlike generic rules, policy statements are easily modified to reflect new scientific developments.[284]

Agencies can, however, fall into three traps in utilizing policy statements. First, unless agencies revise statements to reflect new scientific developments, the documents may be misleading to those who depend on them to indicate the agency's intentions.[285] Second, agencies may be tempted to treat policy statements as if they were binding regulations. When this happens, policy statements become *de facto* generic rules adopted without the benefit of a rulemaking process. Third, policy statements can easily lose their legitimacy if they fail "to distinguish between elements that are intended to summarize current scientific consensus and others that represent policy judgments reached in the absence of consensus."[286] If agencies avoid these problems, the expanded use of policy statements would improve the regulatory process.

Agencies should also consider consulting their science or policy advisory committees for assistance in the development of policy statements.[287] Agencies could also hold one or more "consensus workshops" to which industry and environmental representatives would be invited.[288] Even if no overall consensus was developed at these workshops, an agency would have the benefit of knowing where the parties agree and disagree.

As agencies improve their capacity for risk assessment, they should be able to increase the efficiency of the regulatory process by adopting generic rules. With an improved understanding of the risks biotechnology poses to humans and to the environment, agencies can better decide whether to exempt some areas of biotechnology from regulation and whether to resolve recurring issues in a generic manner. In the meantime, agencies can improve the effectiveness of the regulatory process by utilizing policy statements wherever sufficient information exists to indicate what principles or types of data will be used in making regulatory determinations.

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[283] *See generally* Malloy, *Balancing Public Confidence and Confidentiality: Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies*, 61 TEMPLE L. REV. 723, 791-93 (1988).

[284] *See* Recommendation 82-5, *supra* note 276 ("Where scientific developments in the near term are likely to require modification, or where individual studies or chemicals are often likely to deviate from the 'norm', [agency statements] should not be framed as binding rules.").

[285] *See* J. GIBBS, I. COOPER & B. MACKLER, *supra* note 83, at 116.

[286] Recommendation 82-5, *supra* note 276.

[287] *See infra* text accompanying notes 378-417.

[288] The usefulness of this approach is suggested by the experience of the Keystone Center, which has been successful in conducting consensus workshops on technical issues relevant to questions of public policy concerning natural resources, including biotechnology. *See, e.g.*, KEYSTONE NATIONAL BIOTECHNOLOGY FORUM, INTERIM SUMMARY REPORT: AN ANALYSIS OF THE FEDERAL FRAMEWORK FOR REGULATING PLANNED INTRODUCTIONS OF ENGINEERED ORGANISMS (1989).

V

IMPROVING REGULATORY PROCEDURES: USING PUBLIC PARTICIPATION TO INCREASE LEGITIMACY

In the design of a regulatory system for biotechnology, decisionmakers must also choose what procedures an agency will use to make regulatory determinations. Two principle issues are involved. First, an agency must determine the form and extent of public participation. This involves deciding both what type of procedures will be used and who will be able to participate. For example, should agencies make special efforts to notify citizens who live near the sites of proposed field tests of genetically engineered organisms? Agencies must also address a related issue: how should the public's interest in reviewing the scientific data underlying a decision be balanced against industry's interest in protecting confidential information? Second, the agency must determine what role, if any, technical advisory committees should play in the decisionmaking process.

Resolving these issues will involve agencies in the ongoing debate concerning the value of public participation in agency decisionmaking. Critics of public participation believe that because most citizens lack the training to understand complicated scientific issues, their participation delays decisionmaking without creating offsetting benefits.[289] Worse, critics fear irrational public reactions,[290] such as the efforts of some communities to ban DNA research when it was first introduced.[291]

Supporters of public participation make two responses. First, they contend that the critics ignore the value of public participation in establishing the legitimacy of regulatory decisions. Public participation in agency decisionmaking builds greater public acceptance of new technologies.[292] Second, public participation can increase the accuracy of agency decisions. Most Institutional Biosafety Committee (IBC) chairpersons report that public representatives have "contributed positively" to their review process.[293] While not every member of the public may be as sophisticated as public representatives to IBC's, many informed citizens do have the capacity to contribute.[294]

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[289] Goggin, *Governing Science and Technology: Reconciling Science and Technology with Democracy*, in GOVERNING SCIENCE AND TECHNOLOGY IN A DEMOCRACY 263 (M. Goggin ed. 1986).

[290] Jennings, *Representation and Participation in the Democratic Governance of Science and Technology*, in GOVERNING SCIENCE AND TECHNOLOGY IN A DEMOCRACY 227-29 (M. Goggin ed. 1986).

[291] *See* S. KRIMSKY, GENETIC ALCHEMY: THE SOCIAL HISTORY OF THE RECOMBINANT DNA CONTROVERSY 294-311 (1982).

[292] See Jennings, *supra* note 290, at 235. For example, public distrust of nuclear power can be traced in part to the secrecy of government decisionmaking in the industry's early years. *See* Cole, *Resolving Science Controversies: From Science Court to Science Hearing Panel*, in GOVERNING SCIENCE AND TECHNOLOGY IN A DEMOCRACY 247-49 (M. Goggin ed. 1986); *see generally* D. FORD, THE CULT OF THE ATOM: THE SECRET PAPERS OF THE ATOMIC ENERGY COMMISSION (1982).

Although both sides of this debate have merit, there are good reasons for favoring increased public participation in the regulation of biotechnology. Because biotechnology poses questions of risk assessment and risk management that necessarily involve policy judgments, an agency's recognition of public concerns can help to build confidence in its determinations. This confidence is necessary to avoid an irrational public reaction. Moreover, as the following analysis indicates, agencies have available to them procedures for public participation that do not significantly slow agency decisionmaking. Thus, they can avoid the criticism that the value of public participation is outweighed by the delay it causes.

A. Current Procedures

Most regulatory decisions concerning biotechnology are made without a hearing. However, agencies do generally solicit public input by inviting written public comments. Regulators may also seek additional comments from other agencies, their own advisory committees, or independent scientific organizations.

1. EPA

EPA approves pesticide registrations by informal adjudication, but with notice to the public that an application has been received and that comments are invited. FIFRA requires EPA to publish a notice of the receipt of any application for pesticide registration that involves a new ingredient or new use.[295] EPA then allows thirty days for public comment on the application.[296] EPA must also publish a notice of the receipt of any Environmental Use Permit (EUP) application that is of "regional or national significance."[297] Since FIFRA requires pesticide manufacturers to obtain an EUP before performing field tests,[298] this serves to inform the public whenever an experimental release is planned. If public comments indicate "sufficient interest" in the application, or if it would otherwise be in the "public interest," EPA "may" hold a hearing concerning an EUP.[299]

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[293] U.S. GEN. ACCOUNTING OFFICE, BIOTECHNOLOGY: ROLE OF INSTITUTIONAL BIOSAFETY COMMITTEES 9 (1987) [hereinafter INSTITUTIONAL BIOSAFETY COMMITTEES].

[294] In addition, public sophistication about biotechnology is increasing. Government agencies such as USDA (interview with Al Young, Director, Office of Agricultural Biotechnology, USDA, in Washington, D.C. (June 14, 1988) [hereinafter Young Interview]), nonprofit groups like the Keystone Center (*see* KEYSTONE NATIONAL BIOTECHNOLOGY FORUM, *supra* note 288), and biotechnology companies (*see* Naj, *Clouds Gather Over the Biotech Industry*, Wall St. J., Jan. 30, 1989, at B1, col. 3 (Monsanto sponsored public information campaign to gain public approval for environmental release)), are sponsoring or facilitating public education efforts. These efforts have had an effect in moderating public opinion. A recent poll conducted for the Office of Technology Assessment (OTA) indicates that the public generally favors the development of biotechnology with appropriate regulatory controls. *See* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONG., NEW DEVELOPMENTS IN BIOTECHNOLOGY—BACKGROUND PAPER: PUBLIC PERCEPTIONS OF BIOTECHNOLOGY (1987). OTA found that a majority (55%) of the public agree that the risks of biotechnology have been greatly exaggerated, but also that more than three-fourths of the public agree that "strict regulation" is necessary. *Id.* at 81.

[295] FIFRA, 7 U.S.C. § 136a(c)(4) (1988).

EPA uses similar procedures under TSCA. TSCA also requires EPA to publish a notice of the receipt of any premanufacture notification (PMN).[300] However, PMN's are subject to no other procedural requirements unless EPA attempts to limit the sale of a substance[301] or to order that it be tested.[302] In such cases, EPA must use hybrid rulemaking involving both a notice and comment procedure and a hearing.

In addition to obtaining public input, EPA's Office of Pesticide Programs and its Office of Toxic Substances have two additional ways to obtain advice when a regulatory decision presents significant issues. First, the issues may be given intra-agency review by other EPA programs and offices, interagency review by other BSCC members, or advisory committee review.[303] Second, agency staff may informally consult with scientific experts, members of industry or environmental interest groups, or other parties.[304]

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[296] 7 C.F.R. § 152.102 (1988). EPA will also publish a notice of the issuance of a registration. *Id.* If EPA disapproves the application, the registrant is entitled to a hearing. FIFRA, 7 U.S.C. §§ 136c(6), 136d (1988) (denial of registration and option for public hearings).

[297] 40 C.F.R. § 172.11(a) (1988). EPA must also publish a notice of the issuance of any Environmental Use Permit. *Id.* § 172.11(c).

[298] 7 U.S.C. § 136c (1988).

[299] 40 C.F.R. § 172.11(b); *see also* FIFRA, 7 U.S.C. § 136s(b) (1988) (Administrator may solicit views concerning pesticide registration).

[300] TSCA, 15 U.S.C. § 2604(d)(2) (1988). A manufacturer of chemical substances is required to file a PMN before it manufactures a new chemical substance, or manufactures or processes a chemical substance for a use determined to be "a significant new use." *Id.* § 2604 (a)(1). The notice includes the specific identity of the chemical substance, the categories of its use, a list of data submitted by the manufacturer, and the submitter's identity. 40 C.F.R. § 720.70(a)-(b) (1988). This information, however, will not be disclosed if it is confidential business information. 40 C.F.R. §§ 720.70(b), 720.87; *see infra* text accompanying notes 351-53.

[301] *See* 15 U.S.C. § 2605(c) (1988).

[302] *Id.* § 2603(b)(5).

[303] Rispin Interview, *supra* note 120. For the last purpose, EPA has established the Biological Science Advisory Committee (BSAC), which is composed of nine scientists and two persons representing the general public. EPA, Establishment of the Biotechnology Science Advisory Committee, 51 Fed. Reg. 24,221 (1986).

[304] Carpian Interview, *supra* note 155 (Office of Toxic Substances consultations); 40 C.F.R. § 155.30 (1988) (meetings and communications concerning FIFRA registration standards).

2. *USDA*

USDA's Animal and Plant Health Inspection Service uses informal adjudication to review applications to move plants that are pests or to release them into the environment.[305] When it receives such an application, APHIS also gives notice and invites public comments.[306] APHIS—unlike EPA—is not required by statute to invite public comment because the Federal Plant Pest Act (PPA) has no provision for public participation.[307] In addition, APHIS forwards a copy of each application to the agriculture department in the state where the release will occur,[308] as well as a copy of its initial review.[309]

Although PPA does not specify decisionmaking procedures for approving the release of plant pests, APHIS is subject to the National Environment Policy Act, which does so specify. NEPA requires APHIS either to make and publish a finding of "no significant impact on the environment" or to write an Environmental Impact Statement.[310]

Finally, APHIS, like EPA, may obtain intra-agency review by USDA's Science and Education division and the Office of Agricultural Biotechnology, or interagency review by other BSCC members.[311] APHIS may also seek advisory committee review by consulting the department's Agricultural Biotechnology Research Advisory Committee (ABRAC) or chartering an ad hoc advisory committee.[312]

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[305] Medley Interview, *supra* note 117.

[306] *See* APHIS, Receipt of a Permit Application for Release into the Environment of Genetically Engineered Organisms, 53 Fed. Reg. 40,482 (1988). APHIS may also inspect the site where a release is to occur or where pests are to be contained after their movement. 7 C.F.R. § 340.3(d) (1988).

APHIS holds a hearing only for an applicant whose permit was denied. If a permit is denied or withdrawn, a person may appeal in writing to the Deputy Administrator within 10 days. *Id.* § 340.3(g). Any material disputes as to facts shall be resolved by a "hearing" with rules of practice as adopted by the administrator. *Id.*

[307] *See* 7 U.S.C. §§ 147a-149 (1988). Like the Federal Plant Pest Act, the other statutes under which USDA regulates biotechnology products do not establish a mechanism for public comment concerning agency adjudications. *See* Virus, Serum, Toxin Act, 21 U.S.C.A. §§ 151-159 (West 1972 & Supp. 1989); Poultry Products Inspection Act, 21 U.S.C. §§ 451-470 (1988); Federal Meat Inspection Act, 21 U.S.C. §§ 601-695 (1988). A hearing is available only to the regulated entity if USDA takes an action adverse to it. *See* 21 U.S.C. §§ 156 (Virus, Serum, Toxin Act); 21 U.S.C. § 467(b) (Poultry Products Inspection Act); 21 U.S.C. § 671 (Federal Meat Inspection Act).

[308] 7 C.F.R. § 340.3(b) (1988).

[309] *See, e.g.,* Letter from Arnold Foudin, Acting Deputy Director, Biotechnology Permit Unit, Biotechnology, Biologics, and Environmental Protection, APHIS, USDA, to Howard M. Singletary, Plant Pest Administrator, North Carolina Department of Agriculture (Dec. 30, 1988) (concerning APHIS Preliminary Review of Rohm and Haas Application to Field Test Genetically Engineered Insect Resistant Tobacco Plants).

[310] *See* 40 C.F.R. § 1508.9 (1988); *see, e.g.,* USDA, Availability of Environmental Assessment and Finding of No Significant Impact Relative to Issuance of a Permit to Field Test Genetically Engineered Insect Resistant Tobacco Plants, 54 Fed. Reg. 14,123-24 (1989).

[311] Medley Interview, *supra* note 117.

[312] *Id. See infra* text notes 382-83 and accompanying text.

USDA also informally adjudicates decisions concerning its research guidelines, but with the participation of advisory committees. In some cases, ABRAC advises the Assistant Secretary for Science and Education on whether a proposed research project will comply with the guidelines.[313] In other cases, the Institutional Biosafety Committee for the institution that received the research grant is delegated the authority to determine compliance.[314]

3. *FDA*

FDA also approves new drugs by informal adjudication. The procedure usually includes consultation with advisory committees,[315] but does not provide for public participation.[316] The advisory committees are composed of persons with medical or other scientific expertise.[317] Veterinary drugs present the only exception to this decisionmaking pattern. Because administration of these drugs may involve the environmental release of organisms, FDA may be required to comply with NEPA for applications to test a veterinary drug.[318]

Unlike approval of drugs, FDA's approval of food additives involves public participation. Any person may petition FDA to establish a regulation to approve the use of a food additive.[319] If FDA concurs that a regulation should be promulgated, it must publish a notice of its decision in the *Federal Register.*[320] Within thirty days of this notice, any person adversely affected by the proposed decision may request a hearing.[321]

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[313] Despite its name, ABRAC also serves as an advisory committee for regulatory functions. *See* USDA, Agricultural Biotechnology Research Advisory Committee, Members and Alternates (Aug. 18, 1988). ABRAC is composed of eleven scientists and two lawyers. The scientists include persons with backgrounds in animal science and veterinary medicine, ecology and environmental science, entomology, immunology, industrial microbiology, microbiology and plant pathology, and plant science. *Id.*

[314] Young Interview, *supra* note 294.

[315] FDA consults standing advisory committees for most applications. Cheaper, *Scientific Issues and the Function of Hearing Procedures: Evaluating the FDA's Public Board of Inquiry,* 1986 DUKE L.J. 288, 302 & n.100 [hereinafter *Public Board of Inquiry*].

[316] For new drugs, the Food, Drug, and Cosmetic Act mandates a decisionmaking process consisting of several steps, each requiring the drug manufacturer to submit different types of testing data. The Act, however, has no provisions for public input. Manufacturers must present a three-phase test of a drug on human beings and at least two well-controlled clinical studies. 21 U.S.C. § 355(a) (1988); 21 C.F.R. § 314.5 (1989). *See also* Cheaper, *Divorcing Profit Motivation from New Drug Research: A Consideration of Proposals to Provide Reliable Test Data,* 1978 DUKE L.J. 155, 157. Before human trials can commence, however, the manufacturer must submit a Notice of Claimed Investigation Exemption for a New Drug containing the results of *in vitro* and animal studies on the pharmacologic and toxic effects of the drug. 21 C.F.R. § 312.20; Cheaper, *supra,* at 157-58. If FDA refuses to approve an application, a drug manufacturer is entitled to a formal adjudicatory hearing or several informal methods of resolving its dispute. 21 U.S.C. § 355(c)(2); 21 C.F.R. § 314.200. An applicant can have a hearing before a Public Board of Inquiry (a three-person scientific panel), before an advisory committee, or before the Commissioner of FDA. *Public Board of Inquiry, supra* note 315, at 290.

[317] *See infra* note 386 and accompanying text.

[318] von Oehsen, *supra* note 10, at 853-61.

[319] 21 U.S.C. § 348(b)(1) (1988).

B. *Designing Improved Procedures for Public Participation*

The current pattern of public participation presents three issues. First, is notice and comment adjudication adequate to ensure accurate and legitimate agency decisions? Second, should there be additional procedures to enable persons located near the site of proposed field tests of bioengineered organisms to participate in the decisionmaking process? Third, can FDA justify a process for approval of bioengineered drugs that has no public participation?

1. *Notice and Comment Adjudication*

Public participation in decisions about biotechnology occurs almost exclusively by written comments.[322] Limiting public participation to written comments is associated with informal rulemaking. This regulatory procedure is usually considered suitable for health and environmental disputes because such disputes are dominated by questions that typically do not involve adjudicatory facts, which require objective determinations, but rather involve "legislative facts" or value judgments.[323] Questions of biotechnology risk assessment and risk management similarly do not have objective answers,[324] and therefore also involve "legislative facts" or policy judgments. This suggests that the use of a notice and comment procedure should generally be adequate to promote the accuracy and legitimacy of regulatory decisionmaking for biotechnology.[325]

Both EPA and USDA invite public comments during their regulatory decisionmaking for biotechnology, although only EPA is under statutory requirement to do so.[326] The fact that USDA is not formally required to invite public participation may discourage public comment by creating the appearance that such comments are not considered. Moreover, without a formal requirement, APHIS could withdraw its procedure for public participation on a whim. For these reasons, APHIS should adopt regulations that specify how the public can participate in its decisionmaking process.

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[320] *Id.* § 348(e).

[321] *Id.* § 348(f)(1).

[322] Note that while the approval of food additives may require a hearing, FDA does not provide for public participation in the approval of new drugs. *See supra* note 316 and accompanying text.

[323] *Public Board of Inquiry, supra* note 315, at 297. The framers of EPA chose informal rulemaking for the production of regulations because they assumed that disputes concerning "legislative facts" did not require a highly developed advocacy process. *Id.* at 296. Legislative facts, in Professor Davis' characterization, are "general facts which help the tribunal decide questions of law, policy, and discretion." Davis, *The Requirement of a Trial-Type Hearing,* 70 HARV. L. REV. 193, 199 (1956). Hearings were reserved for disputes concerning "adjudicatory facts" or facts that are capable (at least theoretically) of an objective determination. *Public Board of Inquiry, supra* note 315, at 296. "Adjudicatory facts" are facts that answer "the questions of who did what, where, when, how, why, with what motives and intent." Davis, *supra,* at 199.

[324] *See supra* text accompanying notes 50-81, 223-88.

[325] *See* McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA,* 67 GEO. L.J. 729, 732 (1979); Yellin, *High Technology and the Courts: Nuclear Power and the Need for Institutional Reform,* 94 HARV. L. REV. 489, 549 (1981).

A notice and comment procedure may ordinarily be adequate for public input, but certain situations arguably call for agencies to consider holding informal hearings. Hearings can increase the legitimacy of the decisionmaking process in cases involving significant public interest.[327] Similarly, hearings can increase the accuracy of decisions in scientifically complex cases by clarifying what inferences the agency and the parties have drawn from the scientific data in their assessments.[328] EPA's regulations under FIFRA specify that it "may" hold a hearing concerning an Environmental Use Permit if public comments indicate "sufficient interest" in the application or it would otherwise be in the "public interest."[329] Other agencies would do well to follow this example.

2. *Local Participation*

Current procedures have one major deficiency that is undermining public confidence in the regulation of biotechnology: they do not enable citizens who live near the release site of engineered organisms to comment on pending agency decisions except in the unlikely case that they read the *Federal Register*. Agencies have recognized the need for local input in such cases; however, none of their responses ensures that local public notice will always occur.

Current efforts to encourage local participation take three forms. First, agencies sometimes notify local officials of pending environmental releases.[330] Second, some decisions involve local institution based review committees with public representation.[331] Third, for some decisions, local review committees must seek public input.[332]

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[326] *See supra* text accompanying notes 295-302, 305-309.

[327] *See* Jennings, *supra* note 290, at 240-41.

[328] *Public Board of Inquiry, supra* note 315, at 298.

[329] *See supra* note 299 and accompanying text.

[330] For example, USDA sends a copy of each Federal Plant Pest Act application for an environmental release to the applicable state agricultural officials. *See supra* notes 308-09 and accompanying text.

In some cases, these steps will still leave the public without notice of pending agency decisions. Notification of state officials will not necessarily result in local notice, nor do institution-based review committees—whether Institutional Biosafety Committees or Environmental Biosafety Committees—ensure local notice.[333] First, local review committees are not always consulted. EPA's decisions concerning pesticides might not involve EBC's, for example.[334] Likewise, APHIS's decisions concerning plant pests would not involve IBC's.[335] Second, public representation on these committees does not guarantee local notice. A General Accounting Office study of research sponsored by the National Institutes of Health found that a majority of IBC chairpersons did not feel that public members provided a sufficient mechanism for notifying the community about recombinant DNA research activities.[336] Third, only EPA is proposing that institution-based review committees be required to seek local participation. USDA proposes that IBC's decide for themselves whether to notify the public and seek comments.[337]

The hit-and-miss nature of provisions for local public notification may reflect agency fears that notification will delay agency decisionmaking or invite irrational public reactions. These concerns, however, are unfounded. The idea of local notice is to provide citizens who do not read the *Federal Register* an opportunity to file written comments; this step need not unduly delay an agency.[338] Moreover, as noted earlier, the availability of public participation could legitimize the agency's decisionmaking and therefore reduce irrational reactions.[339] It can also assist the agency. Local review committee chairpersons consider public representatives to have "contributed positively" to their review process,[340] suggesting that informed local citizens have the capacity to increase the quality of agency decisionmaking.

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[331] For example, both USDA's draft proposed guidelines for research and EPA's draft proposed TSCA regulations require review committees (IBC's or EBC's) to have at least two public members. USDA DRAFT GUIDELINES, *supra* note 106, § XIIB-1-b. An IBC must have at least six members with technical expertise and at least two members not affiliated with the institution who represent the interests of the community. *Id.* § XIIB-1. EBC's would be required to have at least three technical members and at least two public members. EPA DRAFT RULE, *supra* note 132, at 196.

[332] EPA's proposed TSCA rules, for example, would require EBC's to "take measures to ensure that the public has an opportunity to participate in the review process," including "active solicitation of public comments" and "opening EBC meetings to public attendance." EPA DRAFT RULE, *supra* note 132, at 209. Meetings could be closed to discuss confidential business information. *Id.*

[333] *See supra* text accompanying notes 267-74.

[334] *See supra* text accompanying note 234.

[335] *See supra* text accompanying notes 239-43.

[336] INSTITUTIONAL BIOSAFETY COMMITTEES, *supra* note 293, at 11.

[337] IBC's would not be required to hold open meetings, although USDA would "encourage" them to do so whenever possible. An IBC would be obligated to notify the public and solicit comments only if it decided to make its meeting public. USDA DRAFT GUIDELINES, *supra* note 106, § XIIB-2a.

[338] The agency is free to limit the time period for comment to 30 days or some other short time period. Moreover, if the agency has already invited comments from those persons who receive notice in the *Federal Register*, the agency can use the same time period to receive comments from those responding to local notice. *See supra* text accompanying notes 319-21.

Thus a local notice and comment procedure could be useful, at least in cases that present more than *de minimis* risks. Agencies should develop criteria that would require local notice any time the release of organisms impacts citizens living near the release site in a different manner than other citizens. For instance, the regulated entity could be required to place notices in a newspaper in the locality of the site of the release.[341] Similarly, the local institution based review committee could be required to give local notice whenever it had responsibility for making decisions.

3. *Adjudication Without Public Participation*

FDA is the only agency that resolves the safety of engineered organisms without inviting public comment. The process for approving new drugs is closed due to three reasons. First, FDA treats all health and safety information submitted to it as confidential.[342] The unavailability of this information limits the value of public input.[343] Second, the agency apparently believes that new drug regulation involves such scientifically complex issues that public input would be of uncertain use, even if testing data were available.[344] Third, FDA depends heavily on technical advisory committees for input and peer review,[345] which it may consider a form of public participation.

The exclusion of the public from FDA's regulatory decisionmaking concerning new biotechnology products is indefensible. As noted earlier in this section, public input adds democratic legitimacy to agency decisionmaking, and it may provide an agency with useful advice. Moreover, FDA's confidentiality policies need not bar public participation. FDA currently releases summaries of testing data for public consideration at open meetings of advisory committees and other forums.[346] FDA could routinely make such summaries available for purposes of public comment without compromising the need to protect confidential business information.

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[339] *See supra* text accompanying notes 322-29.

[340] *See* INSTITUTIONAL BIOSAFETY COMMITTEES, *supra* note 293, at 9.

[341] *See* H.R. 4452, 99th Cong., 2d Sess. (1986). The purpose of the notice would be to describe the nature and extent of the proposed release. *Id.* It might also be useful to require the regulated entity to notify local government officials. *Id.*

[342] *See infra* text accompanying notes 365-69.

[343] McGarity & Cheaper, *The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies*, 93 HARV. L. REV. 837, 843 (1980). Where health and safety information is confidential, public input is not based on informed and independent scientific judgment. *Id.*

[344] This conclusion is inferred from the fact that FDA does not have nonscientific members on its new drug advisory committees. *See infra* note 386 and accompanying text.

[345] *See infra* text accompanying notes 384-86.

C. Confidential Business Information

Whatever procedures are used, the extent and value of public participation is a function of how much information is available to the public. Environmental groups assert that overzealous protection of scientific data limits public involvement in agency decisionmaking. Biotechnology companies contend that there is too little protection for proprietary data. Creating acceptable agency disclosure policies is central to establishing a legitimate and accurate regulatory system for biotechnology.

1. Current Practices

Current disclosure practices result from the interaction of three laws. First, government employees are subject to criminal penalties under the Trade Secrets Act for the disclosure of "confidential information," unless such disclosure is "authorized by law."[347] Second, "exemption four" of the Freedom of Information Act permits agencies to withhold "trade secrets and commercial and financial information obtained from a person as privileged or confidential."[348] While the tests for trade secrets[349] and confidential commercial information[350] differ, both seek to protect information that would be of commercial value to a firm's competitors. Third, Congress has ordered EPA and FDA to release some types of scientific data in certain circumstances. In these cases, the Trade Secrets Act does not apply since disclosure is "authorized by law."

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[346] *See infra* notes 366-67 and accompanying text. Greater disclosure of health and safety data may also be warranted. *See infra* text accompanying notes 371-77.

[347] 18 U.S.C. § 1905 (1988).

[348] 5 U.S.C. § 552(b)(4) (1988); *see* Chrysler Corp. v. Brown, 441 U.S. 281, 291 (1979). The Supreme Court considers the scope of FOIA and the Trade Secrets Act to be effectively the same. *Chrysler Corp.*, 441 U.S. at 319 n.49.

[349] The *Restatement of Torts* defines "trade secret" as "any formula, pattern, device, or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." RESTATEMENT OF TORTS § 757, comment b at 5 (1939); *see also* 12 MILGRIM ON TRADE SECRETS § 2.01 (1988). Most courts follow this definition. McGarity & Cheaper, *supra* note 343, at 862. However, Public Citizen Health Research Group v. FDA, 704 F.2d 1280 (D.C. Cir. 1983), narrowed the definition by defining "trade secret" as "a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Id.* at 1288 (definition to be used solely for the purpose of the FOIA exemption).

[350] Exemption four of FOIA has three requirements: Information must be commercial or financial, obtained from a person, and confidential or privileged. 5 U.S.C. § 552(b)(4) (1988). Information is "confidential" if its disclosure would "impair the Government's ability to obtain necessary information in the future" or "cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

a. EPA

FIFRA requires EPA to protect confidential business information except under two circumstances. Health and safety testing data is disclosed for "registered" pesticides, and data concerning the "production, distribution, sale, or inventories of a pesticide" may be disclosed "in connection with a public proceeding" if disclosure is "necessary in the public interest."[351] Similarly, TSCA requires EPA to protect confidential business information, except that health and safety testing data is disclosed when a substance "has been offered for commercial distribution."[352] Thus, while TSCA and FIFRA permit the eventual disclosure of testing data, neither one permits disclosure of data that qualifies as confidential business information during EPA's decisionmaking process. For example, when EPA publishes a notice that it has received a premanufacture notice, it deletes the submitter's identity and publishes only "generic" descriptions of the chemical and its uses if this information is confidential business information.[353]

Another problem constrains public participation at EPA. EPA often fails to determine whether or not data is confidential in time to release nonconfidential portions to persons seeking to comment on a pending decision.[354] For example, EPA regulations seem to require that EPA must decide whether to require testing of the chemical substance or restrict its sale within ninety days of the receipt of a PMN.[355] Even if EPA receives a Freedom of Information Act request immediately after publishing a notice that it has received a PMN, it may be unable to determine the validity of a manufacturer's confidential business information claim before a decision on the PMN is due.[356]

EPA has taken two steps to mitigate this problem. First, under its "up-front" documentation policy, it requires manufacturers to justify their confidentiality claims at the time they submit data instead of waiting until someone files a Freedom of Information Act request.[357] Second, as part of an announced policy of maximum possible disclosure,

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[351] FIFRA, 7 U.S.C. §§ 136h(b), h(d) (1988); *see* 40 C.F.R. § 152.119 (1988). EPA is prohibited from "knowingly" disclosing data to "foreign and multinational pesticide producers." 7 U.S.C. § 136h(g). There are restrictions on the subsequent use of the data submitted by domestic manufacturers to register their own products. *Id.* § 136a.

[352] TSCA, 15 U.S.C. § 2613(b)(1)(A)(i) (1988); *see* 40 C.F.R. § 720.90 (1988).

[353] 40 C.F.R. § 720.70 (1988); *see id.* §§ 720.80, 720.85.

[354] Mellon Interview, *supra* note 199; *see also* Evans Interview, *supra* note 120.

[355] *See* TSCA, 15 U.S.C. § 2604(a) (1988).

[356] Mellon Interview, *supra* note 199; *see also* Evans Interview, *supra* note 120.

[357] Interview with Bob Nicholas, McDermott, Will & Emery, in Washington, D.C. (May 9, 1989); Evans Interview, *supra* note 120.

EPA encourages the biotechnology industry to refrain from making broad confidentiality claims.[358] Companies have agreed to comply with this policy in order to build public confidence in the safety of their products and the legitimacy of the regulatory process.[359]

b. USDA

During its decisionmaking process, APHIS is bound by the Trade Secrets Act not to disclose confidential business information.[360] When APHIS receives an application for a permit to release a plant pest into the environment, it sends a copy of the application to the appropriate officials,[361] but withholds any information designated by the applicant as confidential business information.[362] Moreover, unlike the situation at EPA, Congress has not required that APHIS disclose the data at a later time. APHIS also has a problem of responding to Freedom of Information Act requests before its deadline for making a decision.[363] To minimize this problem, APHIS also lobbies biotechnology manufacturers to limit their confidential business information claims.[364]

c. FDA

FDA has the most restrictive confidential business information policies. Unlike EPA and USDA, FDA does not publish a notice of the receipt of an application to market a new drug.[365] Furthermore, no data is disclosed during the approval process, although FDA does release summaries of the safety and effectiveness data after a drug is approved.[366] FDA may at its discretion publicly release summaries of "selected" portions of safety and effectiveness data while an application is pending.[367] Finally, although Congress requires that actual health and safety testing data for a new drug be released once another manufacturer is eligible to sell the drug, it permits that data to be withheld if "extraordinary circumstances are shown."[368] Because FDA defines "extraordinary circumstances" to include any claim that the data is confidential business information—perhaps even a claim that the data could be used by competitors in foreign countries—little data is actually released.[369]

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[358] *See* EPA, Statement of Policy; Microbial Products Subject to Federal Insecticide, Fungicide, and Rodenticide Act and the Toxic Substances Control Act, 51 Fed. Reg. 23,313, 23,319 (1986).

[359] *See* M. MELLON, *supra* note 3, at 52.

[360] *See* APHIS, Policy Statement on the Protection of Privileged or Confidential Business Information, 50 Fed. Reg. 38,561 (1985).

[361] *See supra* text accompanying notes 308-09.

[362] 7 C.F.R. § 340.3(a)-(b) (1988).

[363] APHIS regulations require that it make a decision concerning the environmental release of a pesticide within 120 days. *Id.* § 340.3(b).

[364] Medley Interview, *supra* note 117.

[365] Applications for FDA Approval to Market a New Drug or an Antibiotic Drug, 21 C.F.R. § 314.430(b) (1989). FDA will release the information if it "has been previously publicly disclosed or acknowledged." *Id.*

[366] *Id.* § 314.430(e)(2).

[367] *Id.* § 314.430(d).

[368] Drug Price Competition and Patent Term Restoration Act of 1984 § 104, 21 U.S.C.

2. *Adequacy of Disclosure*

Under the current legal framework, a biotechnology company can seek protection for its scientific data by arguing that its competitors would be benefitted by disclosure of the data. If an agency accepts this claim, it protects the data unless the data comes within the disclosure requirements established by Congress for health and safety testing data. None of these provisions requires disclosure during an agency's decisionmaking process. Nevertheless, health and environmental data are often available before EPA or USDA makes a decision because, with agency encouragement, biotechnology companies are restricting their confidential business information claims.[370]

This availability of data suggests that the existing approach is adequate. Environmentalists concede that they currently have adequate information to participate in most cases at EPA and USDA.[371] However, industry cooperation may be a weak base on which to build disclosure policies. First, not all companies are willing to disclose the information upon which agency decisions are based.[372] Second, the data currently being disclosed concern small-scale field testing. Companies are likely to

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§ 355(l) (Supp. V 1987); *see* 21 C.F.R. § 314.430(f)(5) (1989).

[369] 130 CONG. REC. S10988-89 (daily ed. Sept. 12, 1984) (letter of Frank Young, Commissioner, FDA, to Sen. Orrin Hatch, defining "extraordinary circumstances" to include testing data if it is shown to have commercial value to competitors). *See* Shacknai, *Trade Secrets under the Drug Price Competition and Patent Term Restoration Act of 1984*, 40 FOOD DRUG COSM. L.J. 329, 334-36 (1985).

Although it was settled, a recent lawsuit illustrates the effect of FDA's policy on public participation. In 1986, three public interest groups petitioned FDA to prepare an environmental impact statement concerning applications by several pharmaceutical companies to sell bovine growth hormone, a genetically engineered animal drug that increases the milk yield of dairy cows. von Oehsen, *supra* note 10, at 856-57. FDA refused because the companies had prepared environmental assessments that concluded environmental impacts were not significant. The petitioners filed suit under FOIA seeking disclosure of the assessments and other documents on which FDA relied. Foundation on Economic Trends v. Health & Human Serv., No. 87-1009 (D.D.C. settled Jan. 16, 1988), *cited in* von Oehsen, *supra* note 10, at 857. The pharmaceutical companies intervened to object that those documents contained trade secrets. According to the companies, environmental data analyzing the discharge of production wastes and drug toxicity could be used by rivals to deduce production patterns, research strategies, approximate date of market entry, and other valuable information that could give them a competitive advantage. *Id.* In this way, broad claims of confidentiality can conflict with public participation.

[370] *See* M. MELLON, *supra* note 3, at 52.

[371] *See, e.g., id.*

[372] Rispin Interview, *supra* note 120; *see* Withers, *Biotechnology: An Industry Perspective*, 34 U. KAN. L. REV. 665, 676 (1986) (arguing that companies' data should not be disclosed in order to speed the registration process and to protect the confidentiality of the information).

expand their confidential business information claims as they move closer to the production of commercial products.[373]

Existing laws permitting companies to claim confidential business information status for health and environmental data focus on whether disclosure may be harmful to a company. A more appropriate approach would be a balancing process that weighs the public interest in disclosure of health and environmental safety information against the private interest in nondisclosure of data that might incidentally give other firms a competitive advantage.[374] Under this approach, once a microorganism or other biotechnology product was patented, a firm that wished to prevent the disclosure of health and environmental data would have the burden of demonstrating why patent protection was insufficient to protect its proprietary interest.[375]

As long as the current process is retained, agencies should require companies to narrow their confidential business information claims as much as possible. For example, companies should not be allowed to claim protection for an entire page to protect one sentence. As a last resort, agencies could publish summaries of confidential health and environmental data, which would give interested persons some idea of the information that is before the agency.[376]

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[373] Interview with Edward Korwek, Hogan & Hartson, in Washington, D.C. (May 31, 1989); Medley Interview, *supra* note 117.

[374] *See* McGarity & Cheaper, *supra* note 343, at 863-64 (discussing both sides of the balancing approach).

[375] McGarity & Bayer, *supra* note 8, at 475-76. Canada has taken this approach: disclosure is authorized if it is in the "public interest as it relates to public health, public safety or protection of the environment" and if it "clearly outweighs in importance" the financial loss to the "competitive position" of a company or person. Access to Information Act, 1980-83, c. 111, Sch. I §§ 20(1), 20(6), 1980-83 Can. Stat. §§ 3324, 3337-3338 (1985).

[376] Although more data would be released under a balancing test, the data used by an agency to make a decision might still be treated as confidential. For example, a company could probably justify broader confidentiality claims if its product were not patented. Moreover, a balancing approach does not solve the problem of delay in adjudicating FOIA claims. To avoid these problems, Congress could order the immediate release of health and environmental data. This approach would be easiest to adopt under TSCA and FIFRA, which already limit how competitors can use another company's data to obtain regulatory approval for their own products. *See* Abramson, *Confidential Business Information Versus the Public's Right to Disclosure—Biotechnology Renews the Challenge*, 34 U. KAN. L. REV. 681, 698 (1986) (discussing FIFRA).

Since industry strongly objects to existing FIFRA and TSCA disclosure provisions, it is not likely to look favorably on broader disclosure requirements. For example, a Monsanto lawyer argues that "destruction of trade secrets through required disclosures" is "prevalent" at EPA. Withers, *supra* note 372, at 676. He contrasts the situation at EPA, where "foreign governments and potential competitors can engage in fishing expeditions for trade secrets and other confidential information," to that at FDA, where nondisclosure "serves the national interest not only by providing the public with safe and effective pharmaceutical products," but also by protecting "the United States' lead in the international market." *Id.* at 676-77.

Although legislative solutions to industry's concerns have been proposed, their adoption could be politically difficult. *See, e.g.*, H.R. 4364, 99th Cong., 2d Sess. § 101 (1986) (providing for limited preregistration access to health, safety, and environmental data). This proposal, Under the existing approach, delays in adjudicating Freedom of Information Act claims invite companies to make extensive confidential business information claims so as to frustrate disclosure during the time a decision is pending. Besides requiring documentation of confidential business information claims, or making quicker Freedom of Information Act decisions, agencies might try two other solutions to deter such abuse. First, some pesticide companies have been willing to release health and environmental data to public interest groups subject to limitations on the data's use and distribution.[377] Agencies could encourage the use of similar confidentiality agreements for data on genetically engineered organisms. Second, agencies could also invite the public to petition for reconsideration of decisions after the data is released. This option would not prevent injuries to persons or the environment that might occur before agency action on the petition, but such a policy might help to discourage companies from abusing their right to seek protection for confidential business information.

D. Advisory Committees

The final element in the design of a regulatory process for biotechnology is to determine the role of advisory committees. Technical advisory committees can assist an agency to make accurate regulatory decisions. All three regulatory agencies rely on advisory committees, but they differ concerning committee structure, membership, and function.

1. Current Practices

EPA determines whether to consult its Biotechnology Science Advisory Committee (BSAC) on an ad hoc basis.[378] Consultation with BSAC[379] takes one of two forms. Either BSAC itself is consulted, or EPA forms a three-person BSAC subcommittee consisting of a BSAC member as chairperson and two other scientists who, although not BSAC

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developed by a coalition of industry and environment groups, would have permitted immediate public access to health and environmental data submitted in pesticide registrations under several restrictions including time limits for viewing data, a prohibition on copying and removal, and proof that observers are neither employed by nor acting on behalf of anyone engaged in the production, sale, or distribution of pesticides. Abramson, *supra*, at 699-700. But if voluntary industry disclosure does not continue and if a balancing process does not work, Congress may have to consider forced disclosure as a last resort.

[377] Abramson, *supra* note 376, at 699.

[378] Evans Interview, *supra* note 120; interview with Elizabeth Milewski, Special Assistant on Biotechnology, EPA, in Washington, D.C. (May 31, 1989) [hereinafter Milewski Interview].

[379] *See supra* note 303. EPA could also consult other agency advisory committees such as its Science Advisory Board or the Administrator's Toxic Substance Advisory Committee. *See* Ashford, *Advisory Committees in OSHA and EPA: Their Use in Regulatory Decisionmaking*, 9 SCI., TECH. & HUM. VALUES 72, 75 (1984).

members, have expertise relating to the issue under consideration.[380] The second option is preferred when BSAC members do not have scientific expertise directly relevant to the issue under consideration.[381]

USDA also uses advisory committees on an ad hoc basis.[382] Both APHIS and the Food Safety Inspection Service either consult the Agricultural Biotechnology Review Advisory Committee, which meets infrequently, or form an ad hoc advisory committee.[383]

At FDA, advisory committees are an integral part of the new drug approval process.[384] FDA has nineteen standing new drug committees including a committee on vaccines and related biological products.[385] Voting membership of the new drug committees is limited to persons with scientific expertise. However, depending on statutory construction, FDA's other advisory committees may have nonvoting consumer representatives.[386]

By comparison, FDA eschews the use of advisory committees for questions about food additives.[387] Instead, it relies on scientific organizations, such as National Academy of Sciences and the Federation of

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[380] Evans Interview, *supra* note 120.

[381] *Cf. Releasing Genetically Engineered Organisms into the Environment: Hearings Before the Subcomm. on Toxic Substances and Environmental Oversight of the Senate Comm. on Environment and Public Works*, 99th Cong., 2d Sess. 13 (1986) (testimony of John Moore, Assistant Administrator for Pesticides and Toxic Substances, EPA, that different scientific expertise is needed for the varied requests for release of microbial pesticides).

[382] Medley Interview, *supra* note 117.

[383] *Id.* For example, APHIS formed an ad hoc advisory committee of governmental scientists to obtain advice about a permit application for a controlled field test of a genetically engineered vaccine. *See* APHIS, Public Meeting; Availability of Environmental Assessment and Preliminary Finding of No Significant Impact for Field Testing a Genetically Engineered Vaccinia Vectored Rabies Vaccine, 54 Fed. Reg. 9241 (1989). About 80 people attended a public meeting of the committee, and a number of them presented their views. BIOTECH. NEWS, May 1989, at 3. Similarly, the Food Safety Inspection Service formed the National Advisory Committee on Microbiological Criteria for Foods for several reasons, including to advise FSIS on how to develop methods to detect and enumerate "microorganisms and toxic agents that are important to the safety and quality of food." *See* Public Citizen v. Nat'l Advisory Comm. of Microbiological Criteria for Foods, 708 F. Supp. 359, 360 (D.D.C. 1988), *aff'd*, 886 F.2d 419 (D.C. Cir. 1989) (citation omitted). Consumer groups have challenged the membership of this committee on the grounds that no consumer representative was included. *See infra* note 413.

[384] *Public Board of Inquiry*, *supra* note 315, at 306; Brown & Richard, *Advisory Committees and the Drug Approval Process*, 2 J. CLINICAL RES. & DRUG DEV. 15, 16 (1988).

[385] *See* 21 C.F.R. § 14.100(b)(5) (1989).

[386] 21 C.F.R. §§ 14.80(b)(1), 14.80(b)(2)(i), 14.80(e) (1989). Most FDA committees consist of nine members, seven of whom are professionals in the field of the committee's subject matter. One member represents industry and one represents consumers. *See* Brown & Richard, *supra* note 384, at 25; Friedman, *Representation in Regulatory Decision Making: Scientific, Industrial, and Consumer Inputs to the F.D.A.*, 38 PUB. ADMIN. REV. 205, 206 (1978).

[387] Interview with Jim Maryanski, Director, Center for Food Safety and Applied Nutrition, FDA, in Washington, D.C. (June 2, 1988).

American Societies for Experimental Biology (FASEB), or on ad hoc consultants.[388]

2. *Advantages and Disadvantages of Advisory Committees*

Advisory committees have several advantages. First, they can supply expertise that agencies lack, particularly for issues on the cutting edge of scientific developments.[389] Second, committees made up of persons with national reputations can enhance the credibility of agency decisionmaking.[390] Third, consultation with outside experts may mitigate any policy biases that the agency's staff or the industry brings to risk analysis.[391] Fourth, advisory committee meetings can provide open forums for discussion among industry, environmentalists, and other interested persons.[392] Finally, when health and environmental data are confidential, advisory panels may be the only way for an agency to obtain peer review of the scientific evidence on which it must base its regulatory decisions.[393]

Advisory committees, however, also have several disadvantages. First, scientific advisory committees sometimes depart from the confines of science, where technical expertise is critical, and wander into the realm of policy, where technical expertise has no particular virtue.[394] Most policymakers understand this problem, but some may decide to disregard it. As long as the policy component of a science/policy question is not immediately apparent to the public, an administrator can use a committee as a shield from criticism by maintaining that the decision was based on the neutral advice of an independent scientific advisory panel.[395]

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[388] Merrill, *Federal Regulation of Cancer-Causing Chemicals*, in 2 Administrative Conference of the United States, Recommendations and Reports 21, 137 (1982) (discussing mechanisms FDA uses in internal review of food additives). For example, FDA recently hired FASEB to identify and categorize the issues that will influence FDA's responsibilities for food safety for the rest of this decade. *See* Food Chem. News v. Young, 709 F. Supp. 5, 6 (D.D.C. 1989). A news organization and a consumer group successfully challenged FDA's contract with FASEB on the basis that it violated the Federal Advisory Committee Act (FACA). *Id.* For discussion of FACA, see *infra* text accompanying notes 414-15. FASEB has also been hired to consult on how FDA will regulate foods containing genetically engineered organisms, although FASEB no longer advises FDA. Interview with Alan Goldhammer, Director of Technical Affairs, Industrial Biotechnology Association, in Washington, D.C. (May 30, 1989) [hereinafter Goldhammer Interview].

[389] Merrill, *supra* note 388, at 127; *Use of Advisory Committees by the Food and Drug Administration: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 93rd Cong., 2d Sess. 13-15 (1974) [hereinafter *FDA Hearings*] (testimony of Alexander Schmidt, FDA Commissioner); Department of Health, Education, and Welfare, Review Panel on New Drug Regulation, Final Report 52 (1977) [hereinafter Review Panel]. This function includes explaining complex issues and identifying areas of consensus among scientists. Ashford, *The Role of Advisory Committees in Resolving Regulatory Issues Involving Science and Technology: Experience from OSHA and EPA*, in Law and Science in Collaboration: Resolving Regulatory Issues of Science and Technology 166 (1983); *see also* National Academy of Sciences/National Research Council, Risk Assessment in the Federal Government: Managing the Process 98 (1983) (discussing OSHA's peer review policy).

[390] Merrill, *supra* note 388, at 127; *FDA Hearings*, *supra* note 389; *Public Board of Inquiry*, *supra* note 315, at 306-07.

[391] Merrill, *supra* note 388, at 128. *Cf.* Review Panel, *supra* note 389, at 52 (FDA advisory committees are an "important source of peer review" for proposed FDA decisions).

[392] Milewski Interview, *supra* note 378.

[393] For example, at FDA, where health and safety data are confidential business information, *see supra* text accompanying notes 365-69, the agency makes the data available to its advisory committee members. 21 C.F.R. § 20.84 (1989).

Second, although conflict of interest regulations screen out committee members with a direct financial interest in a matter,[396] other problems of bias can emerge. An administrator may politicize the process of selecting committee members by choosing those whose past actions indicate general agreement with the administrator's policy preferences.[397] Advisory committees can also exhibit a more subtle form of bias. Most scientists on biotechnology advisory committees work for industry as employees or consultants,[398] employment that might subconsciously influence the type of advice they give.[399]

Finally, those who believe committee members will not give candid advice in open meetings perceive the requirement that advisory committee meetings be public as a disadvantage.[400] This concern may have influenced FDA's decision to hire a contractor for advice concerning engineered foods.[401] Rather than charter its own advisory committee, FDA instructed the Federation of American Societies For Experimental Biology, the contractor, to assemble an expert panel of scientists to prepare a report.[402] Public Citizen challenged the arrangement on the basis that FASEB was an advisory committee subject to the requirements of the Federal Advisory Committee Act (FACA).[403] In *Food Chemical News v. Young,* the court agreed and required FDA to comply with FACA by making its advisory committee meetings open to the public.[404]

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[394] Cheaper & McGarity, *supra* note 195, at 35-36; *see Public Board of Inquiry, supra* note 315, at 320-24.

[395] For this policy to work, the administrator must ensure that a majority of the committee will supply the "proper" answer. This can be accomplished by "stacking" the committee with scientists whose past actions indicate they will generally resolve policy questions to the decisionmaker's liking. *See infra* note 397 and accompanying text.

[396] *See, e.g.*, 21 C.F.R. § 19.5 (1989) (FDA regulations).

[397] For example, prior to the Reagan administration, the FDA Commissioner was responsible for all committee appointments. The decision by the Secretary of Health and Human Services (HHS) to reclaim the appointment power has been interpreted as an attempt to reward political loyalists and to increase the number of members with views of regulation compatible with the administration's. Brown & Richard, *supra* note 384, at 26 n.3; *see* Sun, *FDA Spars with HHS on Advisory Posts*, 224 SCI. 698 (1985); Russell, *Some at the FDA Fear Politics Tainting Science*, Wash. Post, June 8, 1982, at A1, A8. In addition, "hit lists" were reportedly circulated during the transition in 1981 suggesting that certain members of EPA's scientific advisory committee be purged. Ashford, *supra* note 379, at 72; Address by T. McGarity, Risk and Trust—The Role of Regulatory Agencies in Dealing with Risk: The Courts, the Agencies and Congress 16 (1985) (presentation delivered at the Fourteenth Annual Conference on the Environment).

[398] *See, e.g.*, USDA, Agricultural Biotechnology Research Advisory Committee, Members and Alternates (Aug. 18, 1988).

[399] T. GREENWOOD, KNOWLEDGE AND DISCRETION IN GOVERNMENT 194 (1984).

[400] *See* Lakshmanan, *The FDA's Advisory Committees: Some Suggestions Based on Empirical Data*, 43 FOOD DRUG COSM. L.J. 877, 889-90 (1988). The Federal Advisory Committee Act requires that advisory committees be public unless information that can be withheld from the public under FOIA is discussed. Federal Advisory Committee Act, 5 U.S.C. app. §§ 10(a)(1), 10(d) (1988).

3. *An Appropriate Role for Advisory Committees*

The Administrative Conference favors the use of scientific advisory committees as an "important" means of "validating the technical bases of regulatory decisions" concerning carcinogens.[405] Regulatory agencies could similarly benefit by working with advisory committees in their regulatory decisionmaking concerning biotechnology.

EPA and USDA now use advisory panels on an ad hoc basis, but they may find it useful in the future to establish standing committees, like those at FDA. EPA currently finds it difficult to form a new committee and have it meet within the time deadlines Congress has set for a final decision on a product or research project.[406] This problem is likely to worsen as the number of products and research projects the agencies must approve increases.

Despite the advantages of advisory committees, public interest groups are lukewarm about them because of the potential for inappropriate advice, politicization, or bias.[407] One way to address these concerns is to appoint public members to all panels in order to increase the committees' public accountability.

Some scientists and regulators object to the appointment of consumer representatives to FDA's scientific panels on the grounds that nonexperts offer little technical expertise and that their discussion is often not focused on the technical goals of the panel.[408] Other observers disagree. FDA has placed consumer and industry representatives as nonvoting members on advisory committees for over-the-counter drugs, medical devices, and biologics.[409] While these committees have their share of problems, participants believe they have generally functioned well.[410] Moreover, as previously mentioned, most chairpersons of Institutional Biosafety Committees formed to review NIH-sponsored research conclude that public members have made a valuable contribution to their committees.[411]

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[401] *See supra* note 388 and accompanying text.

[402] Food Chem. News v. Young, 709 F. Supp. 5, 6 (D.D.C. 1989). *See supra* note 388 and accompanying text.

[403] *Food Chem. News,* 709 F. Supp. at 5, 6. FACA requires advisory committee meetings to be open to the public unless one of the exemptions listed in FACA applies. *See infra* text accompanying note 414.

[404] *Food Chem. News,* 709 F. Supp. at 9.

[405] Recommendation 82-5, *supra* note 276.

[406] Milewski Interview, *supra* note 378.

[407] *See, e.g.,* Mellon Interview, *supra* note 199; Friedman, *supra* note 386, at 212.

[408] Brown & Richard, *supra* note 384, at 21 (survey of persons who serve on drug advisory panels); Miller Interview, *supra* note 117.

FDA's model of including one or two nonvoting public representatives on scientific and technical advisory committees is one method to establish the committee's credibility.[412] Nonvoting public members could participate in committee deliberations, thus having the opportunity to influence committee decisions by their advocacy, but without an actual vote on the outcome.[413]

If consumer or environmental representatives cannot participate on advisory committees, the public must depend on the documentation required by FACA to determine how a committee reached its decision and whether its recommendations were justified. FACA requires agencies to give prior notice of meetings, to hold open meetings in most cases, to keep detailed minutes of each meeting, and to give the public access to most committee records, transcripts, minutes, and other documents.[414] In some instances, however, the minutes only briefly summarize the disposition of a matter. They fail to identify clearly either the questions that an agency posed to the committee or the specific answers the committee formulated and the basis for those answers.[415]

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[409] *See* Friedman, *supra* note 386, at 210.

[410] *Id.*; *see also* Field, *GMPAC: A Perspective,* MED. DEVICES & DIAGNOSTIC INDUSTRIES, Dec. 8, 1986, at 8; Brown & Richard, *supra* note 384, at 25 (FDA use of consumer representatives has been "successful").

[411] *See supra* note 293 and accompanying text.

[412] ACUS has stated that "[m]embers of an expert advisory panel should be selected primarily for their expertise in relevant scientific fields." Recommendation 82-5, *supra* note 276. FDA committees meet this requirement because seven of nine members are selected on that basis. *See* Friedman, *supra* note 386, at 210.

[413] Despite the benefits (and feasibility) of including public members, not all agencies are willing to make such appointments. Unfortunately, the courts support such exclusions. Public Citizen v. Nat'l Advisory Comm. of Microbiological Criteria for Foods, 708 F. Supp. 359 (D.D.C. 1988), *aff'd,* 886 F.2d 419 (D.C. Cir. 1989), illustrates this trend. In *Public Citizen,* the plaintiffs argued that USDA had violated the federal Advisory Committee Act's requirement that advisory committees be "fairly balanced in terms of view represented." FACA, 5 U.S.C. app. § 5(b)(2) (1988). USDA's committee was composed of eight government employees and eleven employees, consultants, or contractors of the food industry. 708 F. Supp. at 360. The court applied a test of whether " 'the Committee's members represent a fair balance of viewpoints given the function to be performed.' " *Id.* at 362 (*citing* National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1074 (D.C. Cir.), *aff'g* 557 F. Supp. 524 (D.D.C.), *as modified by,* 566 F. Supp. 1515 (D.D.C. 1983)). It concluded that the committee was "balanced" because it was charged with a "highly technical mandate," the members had "extensive professional backgrounds in various aspects of food microbiology," and there was "no indication" that it was "unable to fulfill its functions." 708 F. Supp. at 363. Decisions such as this one are inconsistent with FACA's legislative history, which indicates that one objective of the balance requirement was to secure interested and knowledgeable nonexperts on advisory committees. Ashford, *supra* note 379, at 76. If the courts continue to exclude public members, Congress should clarify its intentions.

[414] FACA, 5 U.S.C. app. § 10 (1988).

Agencies that rely on advisory panels could increase the legitimacy of their decisions with better documentation of the advisory committee process. Agencies should require a panel to identify the questions it was asked, the possible answers to those questions, which answer was recommended, and why that answer was chosen. In addition, the agency should document the reasons for its response to the committee's recommendations. The Administrative Conference recommends that when an agency rejects an advisory panel's scientific judgment, it "should explain the basis for the rejection."[416] It further recommends that "[w]hen an agency selects a regulatory approach whose basis appears inconsistent with a panel's advice, it should explain the legal, social, and other reasons that dictate or justify that choice."[417]

E. General Principles

In summary, the design of a procedural system for biotechnology should reflect two general principles. First, as a minimum, agencies should give notice to the public that an application has been received and invite public comments. This step recognizes that in a democratic system, public input legitimizes agency decisionmaking and can increase its quality. Public input of this type should not unduly delay agency determinations. Second, agencies should consider using additional procedures when they are likely to increase the legitimacy or accuracy of agency decisions. Appropriate cases include giving local notice to alert citizens with a unique interest in a decision, holding an informal hearing concerning matters of unusual public interest or controversy, and making scientific information available to citizens so long as doing so does not seriously damage an applicant's interest in protecting confidential business information.

CONCLUSION

The government has an almost unprecedented opportunity to make the regulation of biotechnology more effective. It can design a workable regulatory system before the commercial use of genetically engineered organisms becomes widespread. If it takes this step, the country might avoid some of the environmental harms that occurred before regulatory systems were established for chemicals.

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[415] *Public Board of Inquiry, supra* note 315, at 331.

[416] Recommendation 82-5, *supra* note 276.

[417] *Id.*

This Article recommends a number of changes toward that end. First, the regulatory structure should be adjusted to ensure interagency coordination and complete regulatory coverage of the range of biotechnology activities. Second, the White House should redesign BSCC, the committee responsible for regulatory coordination, to avoid the type of interagency conflict that caused the collapse of current governmentwide coordination efforts. Third, agencies should adopt improved methods of risk assessment and risk management to make regulation more efficient without endangering the public. Finally, agencies should adopt regulatory procedures that increase the legitimacy of their decisions by ensuring public participation.

While the outline of how to improve the regulatory systems is clear, the fate of reform is in doubt. The changes suggested require action by individual agencies, Congress, and the White House. Such reform is unlikely to occur, however, without strong leadership.

Congress has shown sporadic interest in biotechnology regulation, but it has tended to address narrow problems rather than the overall design of the regulatory system.[418] The division of oversight responsibility among multiple committees may constrain Congress from taking the lead.[419]

The White House is in a better position to assume a leadership role, particularly through the Office of Science and Technology Policy. OSTP could monitor agency and legislative activity and report to the President concerning progress toward the reforms identified in this Article. The President's commitment to leadership in the area of science and technology policy has been questioned, however, because of his slow pace in staffing OSTP. After one year in office, the Bush Administration still has not filled several important positions in OSTP.[420]

The history of the regulation of chemicals in this country demonstrates the fateful consequences of ineffective regulation. If history is not to repeat itself, the President must make the reform of biotechnology regulation one of OSTP's highest priorities. Although achieving reform will not be easy, effective White House leadership could make it a reality.

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[418] *See, e.g.*, H.R. 4452, 99th Cong., 2d Sess. § 104(b) (1986) (would mandate open meetings of BSCC).

[419] *See* J. WILSON, BUREAUCRACY, WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 256 (1989).

[420] *See White House Science Office On Slow Road to Revival*, SCI. & GOV'T REP., Nov. 15, 1989, at 1-2 ("For White House watchers, the message of all this dawdling was simply that science advice and the office that's supposed to provide it do not rank high with the President or his inner circle."); *Bush Science Aide Sworn in and Goes on Vacation*, SCI. & GOV'T REP., Aug. 15, 1989, at 4 ("The resuscitation of Presidential science advice continues at an unhurried pace that mocks the campaign pledges of George Bush and the importance attached to the role by chiefs of the science establishment.").

THE AVAILABILITY OF DECISIONS AND PRECEDENTS IN AGENCY ADJUDICATIONS: THE IMPACT OF THE FREEDOM OF INFORMATION ACT PUBLICATION REQUIREMENTS

MARGARET GILHOOLEY*

INTRODUCTION

It is no revelation that in common law systems the doctrine of *stare decisis*[1] has had a central role in the development of judge-made law. In many formal agency adjudications, subject to the hearing requirements of the Administrative Procedure Act (APA),[2] agencies publish their decisions, and these are available for use as precedents. Not all agencies publish their decisions, however, nor do they make them available as a body of decisions or regard them as precedential. These practices may more often arise in informal agency adjudications, but the practice is not confined to them.[3]

This Article examines the obligation of agencies to make their decisions available to the public and to recognize precedents in both types of proceedings. An inquiry into the role of precedents in agency proceedings is particularly pertinent in light of the recent opinion in *Allison v. Block*,[4] in which the Eighth Circuit found the Farmers Home Administration's (FmHA) failure to give "some precedential effect" to its informal decisions an indication of a lack of reasoned decision-making.[5] The court in *Allison* required the FmHA to develop its criteria for

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[1] The influence of the *stare decisis* doctrine was evidenced in some of the very first published opinions of American Courts. In *Ex Parte Bollman*, Justice Marshall commented that the principle is particularly important in popular governments where the "influence of passions is strong, the struggles for power are violent, the fluctuations of party are frequent and the desire of suppressing opposition, or of gratifying revenge under the forms of law and by the agency of the courts, is constant and active." *Ex Parte* Bollman, 8 U.S. (4 Cranch) 75, 89 (1807).

[2] 5 U.S.C. §§ 551-559, 701-706 (1982 & Supp. IV 1986).

[3] The decisions of the Social Security Administration in disability proceedings are rarely published even though they are formal proceedings. *Infra* note 153-54 and accompanying text.

[4] 723 F.2d 631 (8th Cir. 1983).

[5] 723 F.2d at 637.

a loan deferral program through rulemaking, rather than through *ad hoc* and informal adjudications that considered each fact pattern in isolation in each case.[6]

To explore the need for publicly available decisions and precedents, Part I of this Article examines the traditional features of a system based on precedent, in order to identify factors that may affect the appropriateness of a precedent system in agency proceedings. In Part II, the Freedom of Information Act (FOIA) is explored. The FOIA is relevant, because it governs the affirmative obligation of agencies to index and make available prior decisions. The availability of decisions is a precondition to their having precedential effect. Part III of this Article discusses the attempt by the Eighth Circuit in *Allison v. Block* to require precedential effect for the decisions of the FmHA. Part IV makes a limited survey of the practices utilized by some federal agencies in making their prior decisions publicly available and in using prior agency decisions as precedents. The procedures examined are those of the FmHA,[7] the Food and Drug Administration,[8] the Department of Defense,[9] and the Social Security Administration.[10] Finally, Part V summarizes the findings of Part IV, analyzing the policies supporting, and difficulties associated with, the use of precedents in agency determinations. Part V concludes that a re-examination of the scope of FOIA's affirmative disclosure requirements is warranted. The statutory provision is intended to help those affected by agency action know how to deal effectively with an agency. A test for disclosure that looks to the needs of participants for guidance better serves the statutory aim than a test that looks solely at the precedential reliance planned by the agency.

I. A Precedent System

A. Reasoned Individual Decisions

For a system to follow precedents, there first must exist explained decisions in cases. The long tradition of providing reasons for judicial opinions has been an important part of the influence of the court system.[11] The APA statutorily requires administrative agencies that conduct formal proceedings to explain the reasons and bases for their decisions.[12] Informal agency adjudications have increasingly been decided on the basis of an administrative record that includes a contemporaneous statement of the basis for a decision. When the agency provides a contemporaneous explanation, judicial review of an agency's decision is based upon this record made by the agency during the administrative process and not a new record created in court.[13] Thus, the incentive created by judicial review has meant that informal agency adjudications produce explained decisions, one of the elements needed for a precedential system.

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[6] Freedom of Information Act, 5 U.S.C. § 552 (1982 & Supp. IV 1986).

[7] *Infra* notes 61-103 and accompanying text.

[8] *Infra* notes 104-27 and accompanying text.

[9] *Infra* notes 128-52 and accompanying text.

[10] *Infra* notes 153-84 and accompanying text.

[11] Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 31 A.B.A. J. 501 (1945) (discussing importance and value of adhering to precedent in judicial decision making).

B. Precedential Effect and Changes in Policy

Courts not only issue reasons for their decisions, they follow the principles of prior cases in similar cases.[14] Although adherence to precedent may reduce a court's ability to deal with the case at hand, other values are promoted, including predictability and notice to those affected; consideration of the lessons of experience; consistency and equality of treatment; restraint on capriciousness by the decisionmaker; and enhancement of the legitimacy of judicial institutions.[15] Courts are not inflexibly bound by precedent. They may distinguish earlier cases and, thereby, reach an alternative result in a particular case by finding that the precedent dealt with a significantly different situation than the case at hand. Courts also can overrule prior precedents of the same tribunal in subsequent decisions by explaining the reasons warranting a change.[16]

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[12] Administrative Procedure Act, 5 U.S.C. § 557 (1982).

[13] *See* Camp v. Pitts, 411 U.S. 138 (1973) (deciding that inadequately explained agency decisions are to be vacated and remanded to agency); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (finding that judicial review of agency fact-finding in informal adjudications is to be based on administrative record); Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976) (surveying administrative procedures used in informal adjudications).

[14] *See* Rumsez v. New York & New Eng. Ry., 183 N.Y. 79, 30 N.E. 654 (1892); *see also Ex Parte* Bollman, 8 U.S. (4 Cranch) 75, 89 (1807) (noting that if law is not settled by repeated decisions, justices are "afloat on the troubled ocean of opinion, of feeling, and of prejudice")

[15] *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); Sprecher, *supra* note 11, at 507-09 (discussing pros and cons of adherence to precedent); Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) (describing theoretically the haphazard development of law without precedents); Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 2-4 (1983) (discussing value of *stare decisis* to judges *and* its ability to enhance work product); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949) (arguing that *stare decisis* takes capricious element out of law and provides social stability).

[16] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (overruling *League of Cities* and finding application of federal minimum wage and maxi-

In formal proceedings, administrative agencies also adhere to precedent. A study at the time of the enactment of the APA found that agencies already followed their own earlier decisions out of a concern for internal consistency.[17] They generally gave "as much weight to their prior decisions as the highest court of a state."[18]

Agencies should not be dissuaded from having decisions available as precedents out of a concern that they will be unduly bound. Like the courts, the agencies can distinguish or overrule their precedents.[19] Indeed, the agencies are not as constrained as courts in terms of overruling their precedents. To overrule their own decisions, courts must justify the change in terms that reflect the court's authority to declare and apply the law.[20] Agencies, by contrast, are expected to take a significant role in developing the law and creating policy. Often, they are delegated discretion by legislative bodies to determine policy given only very general standards.[21] Consequently, agencies have more freedom to justify changes based upon policy factors.

Nevertheless, some restraints on an agency's abilities to change its policy do exist. A presumption in favor of the continuation of a settled rule, for example, requires the agency to offer more justification for changing an established policy than would be required, if the agency were to formulate rules where previously none existed.[22] The agency

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mum hour provisions to employees public authority constitutional), *rev'g*, National League of Cities v. Usery, 426 U.S. 833 (1976); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226 (1975) (substituting comparative negligence doctrine for contributory negligence doctrine in California); Stevens, *supra* note 15, at 4-7 (listing legitimate reasons for court to overrule or decline to follow prior precedent);

[17] ADMINISTRATIVE PROCEDURE IN GOV'T AGENCIES, S. DOC. NO. 8, 77th Cong., 1st Sess. 466-74 (1941). For an analysis of the early use of precedents by administrative agencies, see generally Pittman, *The Doctrine of Precedents and the Interstate Commerce Commission*, 5 GEO. WASH. L. REV. 543 (1937) [hereinafter Pittman, *ICC*] (applying theoretical concepts of precedent to Interstate Commerce Commission decisions); Pittman, *The Doctrine of Precedents and Public Service Commissions*, 11 MO. L. REV. 31 (1946) [hereinafter Pittman, *Public Service*] (concluding Public Service Commission's regulatory control of utilities is highly respectful of common law precedents).

[18] 2 Op. Att'y. Gen., 464, 466 (1941).

[19] *See, e.g.*, Tax Analysts v. IRS, 362 F. Supp. 1298, 1306 (D.D.C. 1973) (holding that although letter rulings and technical advice memoranda by Internal Revenue Service are precedent, they will not necessarily be blindly followed; precedent is only persuasive and can be overruled), *aff'd on other grounds*, 505 F.2d 350 (D.C. Cir. 1974).

[20] *See supra* notes 1, 14 and accompanying text (discussing situations in which overruling is acceptable).

[21] It was the purpose of administrative agencies to develop particularized expertise useful in the formation of public policy. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

[22] Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co., 463 U.S. 29 (1983).

needs to, at a minimum, acknowledge and provide rational support for changes in policy.[23]

C. *Decisionmaking Structure*

In the traditional judicial setting, the decisions of the appellate courts bind the lower courts. Judges below must generally observe the precedent unless and until a higher appellate court overrules it.[24] Decisions made by courts at the same appellate level, however, are given "most respectful consideration."[25]

In traditional formal proceedings, federal agencies generally follow a hierarchical arrangement. The agency head serves as the "final decisionmaker" or appellate tribunal on adjudicatory matters, and the decision binds lower level adjudicators.[26] The agency head also establishes the policy adopted by the agency through means other than adjudication. In administrative agencies, policy typically can be established on a prospective basis through rulemaking and other measures, as well as through a more reactive process of adjudication. The combination of the policymaking and adjudicatory functions in the agency head facilitates the coordinated development of policy.[27]

In other types of agency proceedings, policy-making officials also may have an adjudicatory responsibility.[28] In others, the agency may choose to delegate the decision-making responsibility to lower-level adjudicators who do not have other policymaking responsibilities.[29] In this setting, problems of coordination can arise.[30] The separation of the adjudicatory functions from policymaking may even lead to a reluctance to give decisions a precedential effect. To do so gives the decisions a greater policy significance, even though the policy is established by adjudicators without review by the agency's highest policymakers.

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[23] *See, e.g.*, Atchison, T. & S.F.R.R. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (holding that agency departure from prior norms must be explained so that reviewing court may judge relevance); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1970) (holding agency has right to change its policy course in deciding what is in public interest, but must provide court with reasoning so that court can enforce rule of law in administrative process); *see also* 2 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE, § 8.9, at 198-99 (2d ed. 1979) (discussing *Atchison* and *Greater Television* and noting that "the dominant law clearly is that an agency must either follow its precedents or explain why it departs from them"); *cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co., 463 U.S. 29 (1983) (holding agency failed to provide requisite analysis for revoking rule).

[24] *See* Sprecher, *supra* note 11, at 503 (describing American doctrine of *stare decisis*).

[25] Colby v. J.C. Penney Co., Inc., 811 F.2d 1119, 1123-24 (7th Cir. 1987).

[26] Administrative Procedure Act, 5 U.S.C. § 557 (1982).

[27] *See* Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department; Reflections on The Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231, 1256-60 (1974) (noting that Secretarial control over board decisions assured coherence and intelligence in Department's mining law interpretations); *see also* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965) (discussing agency willingness to utilize rulemaking in administrative process).

[28] *Infra* notes 104-07 and accompanying text.

D. *Public Availability of Decisions*

1. *Court and Formal Agency Proceedings*

In general, court decisions are publicly available and often are published in the case of the highest appellate tribunals. The availability of decisions makes possible the precedential effect of decisions, and the failure to record and disseminate decisions precludes such an effect.[31] The availability of decisions aids a practicing attorney. Citation to prior cases serves to indicate to the court the attorney's view of the "guiding criteria" to be applied to the case.[32] The practicing bar effectively provides the operating force that gives precedents their effect through repeated citation.

However, some court decisions are specifically stated to be without precedential effect and are not cited.[33] The reason for the non-precedential status of these decisions relates to their being merely a repetitive application of settled law.[34] These non-precedential decisions exist within a body of judge-made law elaborated in a great number of printed appellate decisions.

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[29] *See* Administrative Conference Recommendation No. 87-7, A New Role for the Social Security Appeals Council, 1 C.F.R. § 305.87-7 (1988) [hereinafter ACUS Recommendation No. 87-7] (stating that SSA's Appeals Council has come under criticism for failing to consider policy factors in its decisions and commenting that due to increasing caseload, previous policy-relevant role of Appeals Council has been eliminated).

[30] *See* Strauss, *supra* note 27, at 1258 (proposing that when policy choices are allocated between two authorities, different procedures ultimately result).

[31] Pittman, *Public Service*, *supra* note 17, at 45 n.53 (noting that in earliest days of English Chancery Court, Chancellor decided cases without reference to past decisions and failure to record decisions indicated their lack of precedential value).

[32] *See* Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951) (discussing factors that led to evolution of tort law through judicial process over time).

[33] *See* 2 K.C. DAVIS, *supra* note 23, § 8.9, at 199 (noting that only small portion of district court decisions are published).

[34] *See* Note, *Unreported Decisions in United States Court of Appeals*, 63 CORNELL L. REV. 128 (1977-78) (critiquing non-publication or citation of unreported decisions); Render, *On Unpublished Opinions*, 73 KY. L.J. 145 (1984-85) (discussing options available to eliminate precedent problem with unreported opinions); Andreani, *Independent Panels to Choose Publishable Opinions: A Solution to California's Selective Publication System*, 12 PAC. L.J. 727 (1981) (advocating use of independent panels to select opinions for publication).

In formal agency adjudications, agencies often publish the decisions of the highest agency tribunal, typically the collegial body that heads the agency. Publication of decisions by agencies such as the National Labor Relations Board, the Interstate Commerce Commission, and the Federal Communications Commission allows for citation by the practicing bar in the same way as court-made precedents. The publication helps attorneys determine the criteria that govern later decisions by the same agency. Also, because these decisions are accessible nationwide, all attorneys, including those who practice outside of the Washington metropolitan area, can adequately advise clients.[35]

Agencies do not publish all decisions reached in formal adjudications.[36] Informal agency adjudications also vary considerably. In those surveyed below, decisions are not published in printed form, are not disseminated publicly, and are not covered by private reporting services.[37]

II. STATUTORY PUBLICATION REQUIREMENT: THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act (FOIA) requires every agency to make publicly available unpublished opinions and orders.[38] Additionally, FOIA requires that each agency maintain an index of its unpublished materials to aid the public in identifying decisions.[39] These affirmative disclosure obligations extend beyond formal APA adjudications[40] but do not extend to every matter within the broad APA definition of adjudications.[41] Instead, based upon the history and purposes of FOIA, the Attorney General's FOIA Manual (Manual) applies disclosure provisions to "structured, relatively formal proceedings, "in which the agency is functioning in a quasi-judicial capacity, and in which its decision is rendered" upon a consideration of statutory or administratively defined standards."[42]

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[35] Strauss, *supra* note 27, at 1243.

[36] *See* ACUS Recommendation No. 87-7, *supra* note 29, § 305.87-7(1)(a)(2), (1)(f) (1988) (recommending that SSA's Appeals Council institute "publication of precedent by a recognized reporter service").

[37] FDA matters are reported in Commerce Clearing House (CCH) Food & Drug Decisions, but the decisions on matters subject to regulatory hearings are not reported.

[38] The FOIA statute provides, in pertinent part, the following:

> (2) Each Agency, in accordance with published rules, shall make available for public inspection and copying—
>
> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases . . .
>
> unless the materials are promptly published and copies offered for sale. . . . Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public . . . required by this paragraph to be made available or published. . . . Each agency shall promptly publish, . . . and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request. . . . A final . . . opinion . . . that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—
>
> (i) it has been indexed and either made available or published as provided by this paragraph; or
>
> (ii) the party has actual and timely notice of the terms thereof.

All proceedings surveyed in this Article would seem to be within the category of structured decisions discussed in the Manual.[43] Indeed, even informal adjudications decided on a written record, without an oral hearing, seem to have the characteristics described in the Manual. The evolution in the basis for reviewing informal adjudications based on a record has given more of these proceedings the attributes identified in the Manual as bringing the proceedings within the reach of the FOIA provisions.

The appropriate test to be used in determining which types of decisions are covered by the affirmative disclosure obligation has generated some debate. The Attorney General initially found that the statute "seems" to require indexing only those materials cited by or relied

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5 U.S.C. § 552(a) (1982). Affirmative disclosure requirements also apply to agency manuals and statements of policy not adopted by rule.

[39] *Id*; *see generally* Clarifying and Protecting the Right of the Public to Information, S. Rep. No. 1219, 88th Cong., 2d Sess. 12 (1964) [hereinafter Senate Report No. 1219]; Clarifying and Protecting the Right of The Public to Information, and for Other Purposes, S. Rep. No. 813, 89th Cong., 1st Sess. 7 (1965) [hereinafter Senate Report No. 813]; U.S. Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act at 14 (U.S. Dept. of Justice, 1967) [hereinafter Att'y Gen.'s Memorandum on Public Information Section]; U.S. Attorney General's Memorandum on the 1974 Amendment to the Freedom of Information Act (U.S. Dept. of Justice, 1975) [hereinafter Att'y Gen.'s Memorandum on 1974 Amendment] (identifying primary purpose as to compel disclosure of the agency's "secret law"); Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 707 (1967) (finding that memorandum giving instructions for evaluating complaint's merits is final opinion and not exempt from disclosure on basis of inter-agency memorandum exception); 5 U.S.C. § 553(a)(2) (1982) (prohibiting decisions to be used as precedent against members of public if not indexed and made available, unless timely notice is otherwise given).

[40] Att'y Gen.'s Memorandum on 1974 Amendment, *supra* note 39, at 20.

[41] *Id.* (noting that to do so would encompass matters not intended, such as Park Police tickets and IRS refunds).

[42] *Id.*

[43] *See id.* (claiming provision applies to agency proceedings in which agency is acting quasi-judicially).

upon as precedent.[44] This limitation was derived from both the enforcement provision in the statute, precluding the agency from giving precedential effect to matters not indexed, and the legislative history of the statute,[45] which indicates that the disclosure requirement makes available documents "having precedential significance."[46]

The Attorney General also was influenced by the impracticality and futility of indexing all decisions.[47] Others have also suggested that it may be better to have agencies rely solely on published decisions.[48] The public can ignore the unpublished decisions without fear that the agencies will use them as precedent.

On the other hand, the limitation of the requirement solely to precedential decisions has been criticized because it would provide agencies with too much discretion to select decisions to be given precedential effect.[49] Instead, private parties affected by agency action should be able to determine which decisions have precedential value.[50] Accordingly, all decisions should be made available and be indexed.

Further, the legislative history indicates that the underlying aim of the FOIA indexing requirements was "to afford the private citizen the essential information to deal effectively and knowledgeably with the [f]ederal agencies."[51] The purpose was also to guard against "secret law."[52] The few court cases dealing with the disclosure requirement generally have given the precedential test an expansive reading.[53] In these cases, the obligation to disclose applies not only to decisions that an agency considers to be binding in the future but to all decisions an agency retains for general reference and research. An agency's use of decisions in developing future guidelines sufficiently subjects the decisions to disclosure.[54]

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[44] Att'y Gen.'s Memorandum on the Public Information Section, *supra* note 39, at 15.

[45] *See* SENATE REPORT NO. 813, *supra* note 39, at 7 (discussing prohibition on agencies from giving precedential effect to decisions not properly indexed).

[46] *See* HOUSE COMM. ON GOVERNMENT OPERATIONS, GOVERNMENT INFORMATION.—PUBLIC ACCESS, H. REP. NO. 1497, 89th Cong., 2d. Sess. 7 (1966), *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2418 (claiming APA once allowed wide withholding of information but now new legislation is "disclosure" statue); SENATE REPORT NO. 813, *supra* note 39, at 6 (finding that requirement precluding agencies from relying on unpublished material as precedents gives agencies "added incentive" to make available required material).

[47] *See* Att'y Gen.'s Memorandum on the Public Information Section, *supra* note 39, at 15 (arguing that sanction limits indexing to orders with precedential effect that result from final dispositions of adjudicative proceedings).

[48] *See* Strauss, *supra* note 27, at 1243 (suggesting that reliance on indexed but unprinted material should be avoided because of their relative inaccessibility).

[49] *See* 1 K.C. DAVIS, *supra* note 23, § 5.7, at 324-28; Comment, *The Freedom of Information Act: Access to Law*, 36 FORDHAM L. REV. 765 (1968) (discussing problems resulting from agencies using FOIA and their discretion to justify withholding information); *see also* Davis, *supra* note 39, at 782 (discussing records that should be subject to index provisions).

[50] *See* Davis, *supra* note 39, at 779 (claiming portions of staff guidelines used in determining and adjudicating cases should be available to public for use in argument).

[51] SENATE REPORT NO. 1219, *supra* note 39, at 12.

[52] *See* Att'y Gen.'s Memorandum on 1974 Amendment, *supra* note 39, at 28.

As an alternative grounds, the courts have explicitly rejected limiting the FOIA disclosure requirement solely to precedential decisions.[55] The "enforcement" provision is viewed as a means to secure compliance by the agency and does not limit the scope of the broader language of the statutory text which requires agencies to index "final decisions," a term that taken literally could cover all decisions.[56] The decisions in these cases have dealt with situations where indexing and availability were required under the expansive version of the precedential test.[57] Thus, they do not fully test whether courts will impose an affirmative obligation when the agencies have not retained any decisions. The rationale of these court decisions would lead to an obligation for the indexing and disclosure of all agency decisions, but such an obligation is burdensome and may serve little purpose.

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[53] Irons v. Gottschalk, 548 F.2d 992 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 965 (1977); Tax Analysts v. IRS, 362 F. Supp. 1298, 1306 (D.D.C. 1973), *aff'd on other grounds*, 505 F.2d 350 (D.C. Cir. 1974).

[54] National Prison Project v. Sigler, 390 F. Supp. 789 (D.D.C. 1975). The expansiveness of the reading in the latter instance may be attributable to the experimental nature of the particular proceedings at issue. For example, where an agency has established a pilot program of providing reasons for parole determinations each decision may be reviewed by the agency for its potential value in developing and revising guidelines. *Id.* at 794. In this context, individual decisions may be especially important to those inside the agency in formulating an emerging policy. *See* Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1114 (D.C. Cir. 1974) (holding that because guidelines concerning parole hearings impact upon parole determinations, they must adhere to APA rulemaking requirements).

[55] National Prison Project v. Sigler, 390 F. Supp. at 793; *cf.* Tax Analysts v. IRS, 362 F. Supp. at 1303 (requiring that under FOIA agency interpretations with general applicability be published in *Federal Register* with those not of general applicability be made available to public), *aff'd on other grounds*, 505 F.2d 350 (D.C. Cir. 1974); *See* U.S. Gen. Acct. Off., Freedom of Information Act: Noncompliance with Affirmative Disclosure Provisions, 27 (1986) [hereinafter General Acct. Off.] (noting that 15 out of 25 federal agencies evaluated were not in full compliance with various aspects of FOIA (a)(2) disclosure requirements).

[56] National Prison Project v. Sigler, 390 F. Supp. at 793; Tax Analysts v. IRS, 362 F. Supp. at 1306. *See* 26 U.S.C. §§ 6103, 6110 (1982 & Supp. IV 1986) (governing FOIA-like disclosure and indexing obligations of IRS).

[57] *See* National Prison Project v. Sigler, 390 F. Supp. at 789 (concluding that materials determined to be agency orders must be made available to public); Tax Analysts v. IRS, 362 F. Supp. 1298 (D.D.C. 1973) (affirming holding that FOIA mandated public disclosure when agency statements of policy or interpretations are made), *aff'd on other grounds*, 505 F.2d 350 (D.C. Cir. 1974).

In *NLRB v. Sears, Roebuck & Co.*,[58] the Supreme Court gave the related FOIA affirmative disclosure requirements governing agency memoranda an expansive reading. The memoranda sought by the plaintiff were explanations of the agency's reasons for declining to initiate complaints, effectively final dispositions of matters. The memoranda were the type of agency decision in which "the public is so vitally interested and which Congress sought to prevent the agency from keeping secret."[59] Though the precedential test was not at issue, the Court noted that final opinions provide "guides for decisions of similar and analogous cases" as well as explanations for the decision reached.[60] This recognition of the guidance value of decisions suggests a test for the disclosure of final decisions that focuses less on the binding nature of the precedent and more on the value decisions can have to inform and guide the public.

III. THE JUDICIAL EFFORT TO REQUIRE PRECEDENTIAL DECISIONS: *ALLISON V. BLOCK* AND THE FARMER'S HOME ADMINISTRATION

A. Allison v. Block

Allison v. Block was one of a series of cases that criticized the Farmer's Home Administration's (FmHA) denial of loan repayment deferrals to farmers.[61] Under the FmHA program considered in *Allison*, "underprivileged" farmers received loans secured by the farm.[62] If a farmer defaulted under the program, the agency might accelerate the loan and pursue foreclosure.[63] In addition to default measures, the agency could allow the farmer to defer payment, if he became temporarily unable to pay.[64]

After the Allisons defaulted on their loan because of poor farm yields due to inclement weather conditions, the agency accelerated the debt. While an administrative appeal was pending on the decision to accelerate, the Allisons requested a deferral under the deferral provision.[65] A program assistant denied the deferral request, because the Allisons' "past performance show[ed] that they did not have the potential to generate sufficient income to repay . . . expenses plus debt service even if a deferral had been granted."[66]

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[58] 421 U.S. 132 (1975).

[59] *Id.* at 156.

[60] *Id.* at 153 n.5.

[61] *See, e.g.*, Shick v. FmHA, 748 F.2d 35 (1st Cir. 1984) (requiring FmHA give notice to borrower of his ability to defer loan payments); Matzke v. Block, 732 F.2d 799 (10th Cir. 1984) (ordering Secretary to provide notice of deferral procedures); Curry v. Block, 738 F.2d 1556 (11th Cir. 1984) (holding Secretary of Agriculture has duty to implement loan deferral programs).

[62] Curry v. Block, 541 F. Supp. 506, 513-14 (S.D. Ga. 1982) (imposing duty on Secretary of Agriculture to implement loans), *aff'd*, 738 F.2d 1556 (11th Cir. 1984); *See* H.R. REP. NO. 986, 95th Cong., 2d Sess. 22, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 1106, 1127 (1978) (outlining purpose for and noting implementation of loan program).

[63] 7 U.S.C. §§ 1927, 1981(e) (1982 & Supp. IV 1986).

[64] 7 U.S.C. §§ 1981(d) (1982 & Supp. IV 1986).

The Eighth Circuit Court of Appeals found the denial invalid, enjoining acceleration of the underlying loan. The court interpreted the statute to require explicit notice of the deferral program and the establishment of new procedures to consider applications and denials.[67] The court also found that the agency had misinterpreted the statute in a way that led to "no substantive measure of relief."[68] The court believed that few, if any, borrowers would qualify for deferrals if the agency took a literal and stringent approach to the requirement of "temporary" repayment difficulties. The court additionally stipulated that appropriate eligibility standards would have to be developed through rulemaking to ensure that the scale of relief sought by Congress would be reflected by substantive criteria.[69] Adjudication could be used to develop criteria only if the adjudication would have precedential effect, would be consistent with nationwide requests, and would not be made in isolation.[70] The court termed the FmHA decision a conclusory abuse of discretion.[71]

Other courts have enjoined FmHA foreclosures using one or more of the defects identified by the *Allison* court, including the failure to use rulemaking to establish criteria as a basis for the decision.[72] The *Allison* decision, however, was unusual because it identified an absence of precedent as a factor in determining that rulemaking, rather than adjudication, was necessary.[73]

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[65] Allison v. Block, 723 F.2d 631, 633 (8th Cir. 1983).

[66] *Id.* at 633.

[67] *Id.* at 634; *see* Matzke v. Block, 732 F.2d 799, 802 (10th Cir. 1984) (ordering Secretary provide notice of deferral provisions). *But see* United States v. Markgraf, 736 F.2d 1179, 1186 (7th Cir. 1984) (holding that Secretary of Agriculture was not required to give notice of § 1981(a) deferral provisions). *See generally* Note, "*You Mean I Could've Saved the Farm?"- An Examination of the Notice Requirements, of Lack Thereof, of 7 U.S.C. § 1981(a)*, 1985 B.Y.U. L. Rev. 159 (noting resolution of circuit court conflict by adoption of requirement for notification to further statute's purpose).

[68] Allison v. Block, 723 F.2d at 637.

[69] *Id.* at 637-38.

[70] *Id.* at 638.

[71] *Id.* at 638 n.3.

[72] *See* Curry v. Block, 738 F.2d 1556 (1st Cir. 1984) (obligating Secretary of Agriculture to utilize rulemaking procedure and not adjudicatory process); Jacoby v. Schuman, 568 F. Supp. 843 (D. Mo. 1983) (enjoining FmHA from foreclosing on borrowers farms until implementation of regulations farm loan deferrals).

B. Case Analysis

The impact of *Allison* is limited because of the alternative grounds for decision, including the statutory error by the agency. The case also illustrates, again, the difficulties of mandatory rulemaking as an alternative to adjudications.

Although rulemaking has the advantage of involving the public in making policy, the Supreme Court has ordinarily left the choice between rulemaking and adjudication to the "informed discretion" of the agency.[74] The agency's choice of adjudication is often presumed reasonable, because the agency can best assess the variability of the situation, the novelty of the issue, the inappropriateness of a fixed rule, and the need for further experience.[75] However, rulemaking may be required where the use of adjudication amounts to an abuse of discretion, a determination most readily made if past conduct by an individual is penalized by the agency on the basis of some new standard.[76]

In *Morton v. Ruiz*, the Supreme Court found rulemaking to be mandatory in order to preclude *ad hoc* decisionmaking.[77] The significance of the *Ruiz* decision, like the *Allison* case, has been problematical. Other errors in the agency action made it unnecessary to reach the issue of the need for rulemaking.[78] Like *Allison*, the *Ruiz* decision also failed to specify why an *ad hoc* decision should be invalid when the decision was rational on its own terms.

Moreover, when the court is concerned about the lack of clear criteria for the agency decision on eligibility or other matters, mandatory rulemaking may not necessarily produce dispositive standards. A rule may make so many factors relevant, that the ultimate decision is nevertheless subject to considerable discretion. A stricter rule with clearer standards may not necessarily be rational or a suitable way to deal with the matter.[79]

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[73] Allison v Block, 723 F.2d at 636.

[74] *See* SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (finding case-by-case evolution of standards as an alternative to rulemaking); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) (upholding agency choice of adjudication to develop policy absent abuse of discretion).

[75] SEC v. Chenery Corp., 332 U.S. at 204.

[76] NLRB v. Bell Aerospace Co., 416 U.S. at 294.

[77] Morton v. Ruiz, 415 U.S. 199 (1974).

[78] *See* 2 K.C. DAVIS, *supra* note 23, § 7:27, at 140-50 (critiquing *Morton* decision as overly broad).

[79] *See* Heckler v. Campbell, 461 U.S. 458 (1983); WNCN Listeners Guild v. FCC, 450 U.S. 582 (1982) (upholding rule as rational without any waiver procedure);

The lack of a reporting system also may be a factor that explains the judicial concern.[80] The FOIA availability requirements are pertinent to this concern because they represent a congressionally-mandated reporting system. The availability of agency decisions makes it possible for affected parties to cite earlier cases and, thus, to test whether prior cases are of precedential value and need to be considered or distinguished in making a rational decision. The scope of the FOIA requirement is uncertain, however. To the extent the requirement only applies when agencies retain and rely on decisions as precedents, the result may be that no decisions will be available. A broader test for the agencies' obligation that looks to the guidance value of decisions and the needs of participants should lead to the availability of decisions that can be examined by participants both for guidance and potential precedential significance. Thus, the concern of the *Allison* court, that decisions not be *ad hoc*, may be more appropriately directed not at mandating rulemaking but at examining the extent to which agencies should act affirmatively to make their prior decisions available to the public under the FOIA.

C. *Agency Response and Legislative Developments*

After the *Allison* court criticized the FmHA adjudicatory process for failing to give precedential effect to prior decisions,[81] a number of other courts invalidated the FmHA determinations due to inadequate notice of the deferral procedures and a lack of rules.[82] The FmHA reacted by adopting substantive rules through notice and comment procedures, which assured more notice about the deferral program and other farmer loan programs and specified the eligibility criteria in more detail.[83] The agency action did not reflect any steps that would make the process more precedential.

Under the new rules, the need for the deferral must be due to condi-

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Diver, *The Optional Precision of Administrative Rules*, 93 YALE L.J. 65 (1983) (discussing standard to evaluate degree of precision appropriate in administrative rules).

[80] *See* W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF & R. SCHOTLAND, ADMINISTRATIVE LAW 312-14 (8th ed. 1987); *see generally* Verkuil, *supra* note 13, at 789; *see also* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921), *cited in* Sprecher, *supra* note 11, at 507-09; Schauer, *supra* note 15, at 571 (explaining deficiencies in *ad hoc* decisionmaking).

[81] Allison v. Block, 723 F.2d 631 (8th Cir. 1983).

[82] Matzke v. Block, 732 F.2d 799, 802 (10th Cir. 1984); *see* Curry v. Block, 738 F.2d 1556 (1st Cir. 1984) (obligating Secretary to utilize rulemaking procedure and not adjudicatory process); Jacoby v. Schuman, 568 F. Supp. 843 (D.M. 1983) (enjoining FmHA from foreclosing on borrowers farms until implementation of regulations farm loan deferrals); *see generally* Note, *supra* note 67, at 159.

[83] 7 C.F.R. § 1951.44 (1988).

tions beyond the borrower's control, a category that includes, but is not limited to, widespread economic conditions. Furthermore, the rules require the agency to provide specific reasons for any denial.[84] The borrower still must demonstrate that the need for deferral is temporary, and the debt can be repaid at the end of the deferral period.[85] The borrower has the burden of proving repayment ability,[86] and the history of the borrower's previous loans from the agency are part of the record. That record may provide the agency the means to document concerns about repayment ability.[87]

Under the statute, the agency is specifically required to conduct informal hearings for deferrals.[88] Under the procedures, a deferral request is decided by the local county supervisor, an official of FmHA.[89] If denied, the borrower also may request an informal hearing with an FmHA district director to review the denial and the decision to accelerate.[90] Then, the borrower may request a written determination from the FmHA state director, or an unbiased designee, not significantly involved in the case.[91] No national review of this type was provided for in the agency's initial rules.[92] Appeals of deferrals are not compiled or indexed nationally and exist, if at all, at the state level FmHA offices.[93] In recent years, there have been relatively few deferral requests due to the pendency of court injunctions and rule revisions.[94]

Separate from the adjudicatory system, a national office seeks to ensure the consistency of lower level determinations through the regular use of audit teams[95] which selectively review loan decisions made at the lower level.[96] Training programs for the auditees are used to deal with the problems found.[97]

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[84] *Id.* § 1951.44(j)(3).

[85] *Id.* § 1951.44(b)(2), (c)(4).

[86] *Id.* § 1951.44(d).

[87] *Id.* § 1951.44(b)(i).

[88] 7 U.S.C. § 1981(b) (1982).

[89] 7 C.F.R. § 1951.44(h) (1988). Hearings procedures are specified at 7 C.F.R. § 1900.51 (1988).

[90] 7 C.F.R. § 1900.56, Pt. 1900, Subpt. B, Exhibit D (1988).

[91] 7 C.F.R. § 1900.58, Exhibit D (1988).

[92] *Id.*

[93] Letter from FmHA FOIA Officer V. Cunningham to Margaret Gilhooley (Dec. 31, 1987) [hereinafter Cunningham Letter].

[94] *See* U.S. DEP'T OF AGRICULTURE, A STUDY OF THE APPEALS PROCEDURE IN FMHA FARMER PROGRAMS, 7-8 (July 1986) [hereinafter FMHA STUDY OF APPEALS PROCEDURE]. The Study was done during a time period in which foreclosure actions involving deferral request were deferred pending revisions in the rules necessitated by the court litigation.

[95] Audit review is relevant to this article as an example of a management measure to ensure consistency. It is also a process with procedural implications. For example, were a particular decision changed as a result of an audit review, any administrative appeal by the borrower might warrant review by higher level officials not ordinarily subject to the type of supervisory review represented by an audit.

These types of decentralized arrangements may seem at odds with *Allison*'s emphasis on precedent and consistency. Nonetheless, the *Allison* court viewed rulemaking as an alternative to adjudications with precedential effect.[98] If the rules have sufficiently established the criteria, there may no longer be a need for precedential determinations under that court decision.[99]

Recent legislative developments have altered the decentralized proceedings. Congress, in 1988, changed FmHA deferral procedures,[100] establishing a national review office to consider appeals of state FmHA decisions.[101] This review office and its director are concerned solely with hearing issues, a provision that separates the reviewers from program responsibilities and which seems intended to enhance the independence of the review.[102] The existence of a national office for review has the potential for the development of decisions that can serve as precedent that apply nationwide.

The absence of precedents in the FmHA program may be explained in large part by the specific factual nature of FmHA decisions. The bulk of the decisions made by FmHA are undoubtably mere factual applications of the rules. Nonetheless, wider issues may sometimes arise. An FmHA survey found that one of the reasons for delays in farmer loan appeals was the "complexity of regulations and policies which differ substantially for different programs,"[103] suggesting that cases can present difficulties in interpreting and applying the rules. There may be a need for authoritative decision interpreting the rules and illustrating their application in order to provide guidance to those inside and outside the agency.

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[96] Evaluation Reviews FmHA Instruction 2006-M; Evaluation Review Questionnaire District Form FmHA 2006-1; Evaluation Review Questionnaire County Form FmHA 2006-2.

[97] Evaluation Reviews FmHA Instruction 2006-M, § 2006.615.

[98] Allison v. Block, 723 F.2d 631, 636 (8th Cir. 1983).

[99] Some aspects of the agency's revised rules were upheld and some rejected in an initial court test in which the precedential effect of the agency decisions was not issue. Coleman v. Block, 632 F. Supp. 997 (D.N.D. 1986).

[100] Agricultural Credit Act of 1987, Pub. L. No. 101-233, 101 Stat. 1568 (1988) (codified as amended at 12 U.S.C. § 2001 (1986)).

[101] *Id.*

[102] *Id.*

[103] *See* FmHA STUDY OF THE APPEALS PROCEDURE, *supra* note 94, at 34.

IV. PRACTICES IN OTHER AGENCIES

A. *Food and Drug Administrative Regulatory Hearings*

1. *Description*

a) Program Background

The structure of regulatory hearings at the Food and Drug Administration (FDA) stand in contrast to other programs surveyed. The sheer size of caseloads exists as a distinctive feature of the Social Security Administration (SSA) programs; the FDA regulatory hearings are by contrast few in number. Final decisions at FDA are made by officials with policy-making responsibilities; FDA proceedings are followed by a specialized bar. Although FDA proceedings have not produced "precedents" recognized as such in an agency index, in practice all FDA decisions are made available indirectly and when a FOIA request is made. The agency is also taking steps to establish a general index for these proceedings.

The FDA established a procedure for resolving a number of disputed matters on the basis of an informal "regulatory hearing."[104] The procedure provides for an oral hearing before a presiding officer who has not participated in the investigation or action and who is not subordinate to any involved official other than the agency head.[105] Once the hearing is complete, the presiding officer makes a report and, if time permits, provides the parties with an opportunity to review and comment on the report.[106] A Commissioner, or delegate, then issues a final decision based on this record,[107] giving the reasons for the action taken and the basis in the record.[108]

FDA regulatory hearings are available for a number of matters,[109] including the withdrawal of approval of investigational medical devices and the denial of permission to investigate new drugs.[110] Hearings most frequently have involved the disqualification of clinical investigators who have repeatedly or deliberately violated the FDA's requirements for conducting clinical studies.[111] Investigators can be disqualified if they ship, in interstate commerce, drugs that will be used for investigational new drug (IND) testing on human subjects.[112] As a condition of approval, the drug company must agree to have clinical investigators consent to compliance with FDA regulations governing the manner of the research.[113]

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[104] 21 C.F.R. § 16.1 (1988).

[105] 21 C.F.R. § 16.42 (1988).

[106] 21 C.F.R. § 16.60(e) (1988).

[107] 21 C.F.R. § 16.95(b)(2) (1988).

[108] *Id.*

[109] *See* 21 C.F.R. § 16.1(b)(1)-(2) (1988) (listing 10 statutory provisions and 27 regulatory provisions under which regulatory hearings are available).

[110] 21 C.F.R. § 16.1 (1988).

[111] This estimate is based on the author's own examination of the collection of hearings in the FDA Office of General Counsel.

If the agency initiates a disqualification, the investigator is entitled to request a regulatory hearing[114] with a final decision made by an FDA Associate Commissioner.[115] Increasingly, however, a settlement is reached after proceedings are initiated but before hearings occur. Investigators may agree to conduct investigations according to monitoring arrangements.[116]

b) Indexing and Availability of Decisions

The FDA's quarterly activity report, an internal agency publication available to the public upon request, summarizes decisions involving investigators. Although the agency's regulations do not compel the existence of any index or the availability of the decisions,[117] the prior decisions are provided after a FOIA request is made. These decisions are also retained by the General Counsel's office, which is in the process of developing a general index.[118] The FDA Public Dockets Office also maintains lists of recent regulatory hearings. The Clinical Investigations Program Office maintains a list of investigators disqualified or restricted from research through either settlement or hearing.[119] Through FOIA requests, attorneys can obtain previous settlement agreements for use in representing clients.[120]

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[112] 21 U.S.C. § 355(i) (1982 & Supp. IV 1986).

[113] *Id.*; 21 C.F.R. § 312.60-.68 (1988); FOOD & DRUG ADMIN., COMPLIANCE PROGRAM GUIDANCE MANUAL [hereinafter FDA MANUAL] (describing FDA program in detail). Drug sponsors often obtain and send this manual to clinical investigators to inform them as to what to expect in an FDA inspection.

[114] 21 C.F.R. § 312.70(a) (1988).

[115] 21 C.F.R. § 312.70 (1988).

[116] Telephone Interview with Dr. Alan Liscook, Chief, Clinical Investigations Branch of FDA (Oct. 1987) [hereinafter Liscook interview].

[117] 21 C.F.R. § 20.26 (1988).

[118] Interview with Linda Horton, Deputy Chief Counsel for Regulations and Hearings, FDA Office of Chief Counsel (Oct. 1987) [hereinafter Horton interview]. Agency practice of keeping decisions for reference brings them within the scope of the FOIA requirements. *See* Irons v. Gottschalk, 548 F.2d 992 (D.C. Cir. 1976) (holding manuscript decisions of U.S. Patent Office subject to FOIA disclosure requirements), *cert. denied*, 434 U.S. 965 (1977).

[119] Liscook interview, *supra* note 116.

[120] *Id.*

2. *Discussion*

Some reasons weigh against the need to index decision for this program. The few FDA decisions focus on the individual facts of the case. Also, the FDA quarterly activity report and list of disqualified investigators indirectly provide the knowledgeable public access to decisions resulting in unfavorable treatment. Finally, as only a small number of decision-makers are involved, an institutional memory promotes consistency.[121]

There still remain reasons in favor of compilation and indexing of these decisions. Regulatory decisions can involve issues that transcend a particular case.[122] Some decisions have stated general criteria in order to resolve the issues involved.[123] Highlighting such decisions by indexing better ensures accessibility of the principles for the public.

The importance of indexing can be illustrated. In one particular regulatory hearing, the FDA enumerated general criteria that limit the circumstances for terminating approval for IND testing by a drug sponsor. In this instance, lower level program officials refused to permit any further testing of an investigational drug, because the tests to that point had not shown effectiveness, and the drug's method of action was improbable. After a decision, made by the head of the Bureau of Drugs, further testing of the drug, a purported hemorrhoid cure administered via the patient's navel, was permitted. The final decision allowed further research, because research should be terminated only "to protect the health and safety of the public" and not because the likelihood of success was improbable.[124] The agency decision recognized the importance of ensuring the opportunity to pursue research when safety concerns are not present.[125]

This decision illustrates the limitations of a narrow sanction-based precedential test for FOIA indexing and affirmative disclosure requirements. Because the decision relaxed the restrictions on drug sponsors, it is unlikely that the agency would rely on it in future proceedings which seek to impose restrictions. Thus, disclosure of the decision would not be mandatory under the precedential test that precludes agency reliance on decisions not included in the index. Making the decision available, however, ensures that the agency will acknowledge and justify any later changes in position.[126] Additionally, the affirmative disclosure provides some guidance about the agency's regulatory philosophy.[127]

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[121] Horton interview, *supra* note 118.

[122] *See* Letter from Deputy Commissioner Novitch to James R. Phelps, Esq. (Oct. 5, 1984) [hereinafter Novitch Letter] (discussing asserted problem of inconsistent treatment of clinical investigators in determining eligibility for IND testing). The agency later revised its rules to eliminate the adequate assurance procedure that had given rise to the dispute. *See* 52 Fed. Reg. 8831 (1987).

[123] Novitch Letter, *supra* note 122.

[124] Memorandum Decision of J. Richard Crout, M.D., Director Bureau of Drugs on Regulatory Hearing on Termination of IND 9421. The author was an adviser in the preparation of the final decision in this matter.

[125] 21 C.F.R. § 312.44 (1988); *see* 52 Fed. Reg. 8,798, 8,821-22 (1987) (stating that narrow focus on safety at initial stage of investigation reflects desire to remove impediments to innovation at early stages of discovery).

B. Department of Defense Industrial Personnel Security Clearance Review Program

1. Description

The Department of Defense (DOD) procedures for reviewing denials and withdrawals of security clearances from employees of industrial contractors provide a contrasting example of agency practice with respect to the indexing and availability of decisions. The DOD program makes about 150 full hearings and decisions annually,[128] with the DOD Directive for the program considerably limiting discretion of the adjudicators.[129] Cases primarily involve application of law and the DOD Directive to the facts of the case. A comprehensive annual index groups all cases according to the grounds for clearance denial.[130]

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[126] *See, e.g.*, Atchison, T. & S.F.R.R. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (noting presumption that agency "policies will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms"); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) (declaring that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standing are being deliberately changed . . . . [I]f an agency glosses over or swerves from prior precedent without discussion, it may cross the line from tolerably terse to intolerably mute"). *See generally* 2 K.C. DAVIS, *supra* note 23, § 8.9, at 199 (noting that "[t]he dominant law clearly is that an agency must either follow its precedents or explain why it departs from them."); *cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co., 463 U.S. 29, 42 (1983) (holding agency failed to provide requisite analysis for revoking rule procedures).

[127] *See* Atchison, T. & S.F.R.R. v. Wichita Bd. of Trade, 412 U.S. at 807 (stating that adjudicated cases serve as guide for future agency action).

[128] U.S. DEP'T OF DEFENSE, INDEX TO CASES UNDER THE INDUSTRIAL PERSONNEL SECURITY CLEARANCE REVIEW PROGRAM, Vol. V (Jan. 1, 1986-Dec. 31, 1986) [hereinafter DOD INDEX].

[129] U.S. Dep't of Defense, Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program, 32 C.F.R. §§ 155.1-.8 (1987) [hereinafter DOD Directive].

[130] *See* DOD INDEX; 32 C.F.R. § 286.11 (1987) (authorizing maintenance of index).

a) Program background

The DOD clearance program is authorized by a Presidential Executive Order which provides for the issuance of agency regulations.[131] A security clearance is granted when such issuance is "clearly consistent with the national interest."[132] An employee whose clearance is denied or withdrawn, under DOD regulations, receives a statement of reasons for the action and is entitled to an oral hearing.[133] Appeal of this hearing officer's written decision, if taken, proceeds to an Appeals Board, which bases its written[134] and final decision upon the record.[135]

b) Indexing and Availability of Decisions

The final Appeals Board and hearing examiner's decisions are summarized in the agency's prepared index. A letter symbol indicating the principal ground or grounds relied on for withdrawing the security clearance, *e.g.*, financial irresponsibility, unauthorized disclosures, and criminal or dishonest conduct, is a means to research the decision. Summary statements are taken from each decision.[136] These listings include the case file numbers to facilitate FOIA requests, but in order to protect privacy, the listings do not indicate the name of party involved.

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[131] Exec. Order No. 10,865, 3 C.F.R. § 398 (1959-1963), *reprinted in* 5 U.S.C. § 504 (1982 & Supp. IV 1986). A clearance can be denied or withdrawn for several reasons, including treason, "sympathetic association" with a spy, unauthorized disclosure of classified information, criminal or dishonest conduct, acts of sexual perversion, excessive indebtedness, alcohol abuse, and illegal or improper use of narcotics or cannabis. 32 C.F.R. § 155.6(e) (1987).

[132] Exec. Order No. 10,865, 3 C.F.R. § 398 (1959-1963), *reprinted in* 5 U.S.C. § 504 (1982 & Supp. IV 1986); *see* 32 C.F.R. § 155.4 (1987) (stating that any determination authorizing security clearance for access to classified information shall be based only upon finding that to do so is clearly consistent with national interests); *see also* 32 C.F.R. § 155.6(e) (1987) (noting that clearance can be denied for treason, association with a spy, disclosure of classified information, criminal conduct, illegal or excessive use of alcohol or narcotics, or sexual perversion).

[133] Exec. Order No. 10,865, 3 C.F.R. § 398 (1959-1963), *reprinted in* 5 U.S.C. § 504 (1982 & Supp. IV 1986); 32 C.F.R. § 155.7 (1987). This hearing does provide procedural safeguards. Both DOD and the employee are represented by counsel and cross examination is available, unless otherwise harmful to national interests. Exec. Order. No. 10,865, 3 C.F.R. § 398 (1959-1963), *reprinted in* 5 U.S.C. § 504 (1982 & Supp. IV 1986); 32 C.F.R. § 155.6(i)-(k) (1987); *cf.* Greene v. McElroy, 360 U.S. 474 (1959) (holding that in absence of explicit authorization from either President or Congress, respondents not empowered to deprive petitioner of his job through proceeding which does not afford safeguards of confrontation and cross examination).

[134] 32 C.F.R. § 155.7(r)-(u) (1987).

[135] 32 C.F.R. § 155.7(u) (1987); *see, e.g.*, Adams v. Laird, 420 F.2d 230 (D.C. Cir. 1969) (reviewing lower court's grant of summary judgment for Secretary of Defense in action by homosexual seeking declaration and injunctive relief for denial of security clearance).

[136] DOD INDEX, *supra* note 128.

Redacted opinions delete any personal identifying details.

2. *Discussion*

a) Indexing Practices

Though DOD is unusual in providing as much indexing as it does, limitations on DOD's practices affect the utility of its disclosure and index. The existence of the index is not identified in the specific regulations governing the program, and DOD's general regulations governing FOIA indexing do not indicate which programs have indexed decisions.[137] Parties unaware of the index's existence would benefit if DOD regulations made a specific reference to it. This identification may particularly benefit those employees who retain counsel[138] located outside of Washington.

All cases are reported in the index, without regard to their significance or precedential value. As a result, counsel themselves can review prior cases to determine relevance. Nevertheless, a grouping of the unusual cases separate from the routine ones would be desirable to enhance the index's utility.

b) Directives and Adjudicatory Discretion

The current procedure of indexing cases on a comprehensive, rather than a selective precedential basis, appears attributable to the restricted adjudicatory role. The function of the examiners and the Board is centered on factual determinations and applications of the governing standards set out in the agency's rules and directives. Consequently, decisions by both the examiners and the Appeals Board do not typically cite as authority prior agency decisions but instead refer generally to the DOD Directive as the basis for resolving any questions that arise.[139]

The DOD Directive establishes an "Adjudication Policy," which attempts to detail specific factors considered in determining an employee's eligibility for a security clearance and other "mitigating factors" considered relevant.[140] A history of bad debts or of writing insufficient funds checks, for example, may be considered in determining whether an individual is financially irresponsible. However, the decision-maker may consider systematic efforts by the individual to satisfy creditors as a mitigating factor and, thereby, grant[141] the clearance.

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[137] 32 C.F.R. § 155.1-.8, § 286.11 (1987); 5 U.S.C. § 552(a)(2) (1982).

[138] Interviews with program staff, Defense Industrial Personnel Security Clearance Review Program (Oct. 1987) [hereinafter program staff interviews].

[139] *See* Determination of Examiner William R. Kearney, D.I.S.C.R. OSD No. 85-0403, at 5 (Sept. 3, 1986) (referring to cases under DOD Directive 5220.6 as placing burden on government to establish prima facie case that applicant does not possess requisite qualifications for security clearance); *see also* Program staff interviews, *supra* note 138.

[140] 32 C.F.R. §§ 155.6(f), 155.8 (1987).

The DOD Directive illustrates the limited discretion of the adjudicators and the difficulty in applying fixed tests. The adjudication policy is stated in the DOD Directive to be "binding" on determinations of clearance eligibility.[142] The text of the policy appears, in some respects, to leave no discretion. For instance, it might seem that discontinuance of alcohol use for less than two years could not be considered a mitigating factor.[143] Nonetheless, other parts of the DOD Directive mandate that the decision be "a fair and impartial, overall common sense decision based upon a consideration of all available information, both favorable and unfavorable."[144] Based upon this provision, the Appeals Board has found an examiner's "rigid and uncompromising application" of the factors in the adjudication policy arbitrary and inconsistent with the context of the rest of the DOD Directive.[145] Although the adjudication policy is "binding" under the DOD Directive, it cannot be applied to dictate "formula adjudication."[146] Instead, each case must be decided on its own facts.[147]

Board decisions interpreting the effect of the DOD Directive are likely to affect examiners regularly reviewed by that Board and are particularly significant. Within the area of discretion left to the adjudicators by the Directive, the decisions of the Board also can provide guidance in applying the criteria. For this reason, the indexing and publication practices of an agency should highlight decisions that deal with larger questions or provide important guidance. At present, the DOD index does not highlight decisions for their significance, and that determination is left for those who read through all the topical summaries in the annual indices.[148]

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[141] 32 C.F.R. § 155.8(a)(2)(iv) (1987).

[142] 32 C.F.R. § 155.6(f) (1987).

[143] *See* DOD Directive, *supra* note 129, at 3-7.

[144] 32 C.F.R. § 155.6(c) (1987).

[145] Order for Remand, D.I.S.C.R. OSD No. 85-0005 (May 27, 1986).

[146] *Id.*

[147] *Id.* As each case is decided on its own facts, board decisions reflect an individualized approach. *See* Smith v. Schlesinger, 513 F.2d 462 (D.C. Cir. 1975) (allowing *in camera* inspection of file compiled for initial decision to deny security clearance); Gayer v. Schlesinger, 490 F.2d 740 (D.C. Cir.) (finding that DOD did not apply *per se* rule of withdrawing security clearance to homosexual without consideration of plaintiffs individual case), *as amended*, 494 F.2d 1135 (D.C. Cir. 1973).

[148] DOD INDEX, *supra* note 128, at Criteria M and I.

c) Relationship Between Policy and Adjudicatory Responsibilities

The relationship between the policy and adjudicatory functions for the DOD program should be noted. Basic hearing procedures for the programs were established after notice and comment rulemaking, but the adjudication policy, with its quasi-binding effect, was adopted without comment, based upon reliance on the statutory exceptions to rulemaking procedures.[149]

Lastly, the role of the adjudicators in the industrial security program is primarily to make factual determinations. That responsibility affects the future work of the individual employee, as well as the national interest. Therefore, the adjudicatory process must be fair, and due process must be afforded.[150] The examiners, the Appeals Board, and the departmental attorneys who bring cases all share the same offices and use the same library. More importantly, the same director has the responsibility to "manage" the program, involving both the attorneys who bring the cases and the adjudicators.[151] Hearing examiners and Appeals Board members are attorneys designated by the General Counsel of DOD to serve on the program, with the General Counsel administering the program.[152] Some re-examination of program management responsibility, therefore, seems appropriate. At a minimum, the scope of the management responsibility should be specified along with the safeguards to protect the adjudicator's role.

C. Social Security Administration Disability Determinations

1. Availability of Decisions and Precedent Practices

Social Security Administration (SSA) disability and benefit determinations are subject to the formal adjudication requirement under the APA.[153] Nevertheless, the decisions have only rarely been published although this practice may change.[154]

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[149] 32 C.F.R. §§ 155.1-.8 (1987). The adjudication policy in 32 C.F.R. § 155.6(f) and § 155.8 was adopted as a final rule in reliance on the exemptions in 5 U.S.C. § 553(a) (1982).

[150] *See* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) (holding that government must respect due process of law when restricting a private interest and acknowledging that due process is not inflexible procedure); Greene v. McElroy, 360 U.S. 474 (1959) (recognizing due process rights of employees in cases of revocation of security clearance); 32 C.F.R. §§ 155.4, 155.6(c) (1987) (declaring that DOD proceedings shall be conducted in fair and impartial manner and in compliance with due process of law).

[151] 32 C.F.R. § 155.5 (c)(1) (1987).

[152] 32 C.F.R. § 155.5 (b) (1987).

[153] 42 U.S.C. § 405 (a) (1982); *see* Richardson v. Perales, 402 U.S. 389 (1971) (upholding procedures notwithstanding responsibility of Administrative Law Judge to gather evidence).

a) Program Background and Administrative Structure

Claims by permanently disabled workers[155] are processed by the SSA at the state level. Reconsideration is available in case of denials.[156] When a claimant disputes a denial, a federal Administrative Law Judge (ALJ) makes a written decision.[157] An ALJ's decision may be reviewed by the SSA's Appeals Council on its own motion, or at the request of a claimant, where there appears to be an abuse of discretion, an error of law, a lack of substantial evidence, or a "broad policy or procedural issue which may affect the general public interest."[158] Any final denial of a claim made by the Appeals Council or by an ALJ, in a decision not reviewed by the Council, is subject to judicial review in federal district court.[159]

b) Governing Law and Precedents

The SSA has not regarded ALJ or Appeals Council decisions as having precedential effect.[160] Instead, the agency had viewed both the adjudicators and the initial claims examiners as bound only by statute, the substantive rules of the agency, and prior Social Security Rulings (SSA Rulings).[161] These SSA Rulings are determinations by the Commissioner of SSA and are published in bound volumes, and they may reject or adopt the decision of an ALJ or the Appeals Council. The SSA Rulings have binding effect in future cases and, thus, can serve as precedent.[162] However, in practice, the SSA Rulings rarely deal with Appeals Council or ALJ decisions.

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[154] An extensive study of SSA procedures has been conducted. *See* Koch & Koplow, The Fourth Bite of the Apple: A Study of the Operation & Utility of the Social Security Administration's Appeals Council, 1987 Admin. Conf. U.S. 625 (discussing operation of the SSA's Appeals Council and advocating improvements); ACUS Recommendation No. 87-7, *supra* note 36, § 305.87-7(1)(a)(2), (f) (adopting recommendations of Koch and Koplow); J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil, & M. Carrow, Social Security Hearings and Appeals (outlining study on behalf of the National Center for Administrative Justice, 1978) [hereinafter Social Security Hearings and Appeals].

[155] 42 U.S.C. §§ 423(d)(1)(A), 1382(c)(a)(3)(A) (1982); *see* 20 C.F.R. §§ 404.1001-.1096 (1988) (explaining financial eligibility requirements); 20 C.F.R. §§ 416.1100-.1182 (1988) (defining income for purposes of welfare program).

[156] *See* 20 C.F.R. §§ 404.907-.913 (1988) (outlining procedure for reconsideration); Social Security Hearings and Appeals, *supra* note 154, at 60 (examining ability of reconsideration process to aid claimant in preparing for denial hearings).

[157] 42 U.S.C. § 405 (1982). Appeals of ALJ hearings have been as numerous as 300,000 annually, with 180,000 of these involving disability matters. *See* 11 OHA L. Rep. 26 30 (SSA Publication No. 70-032, 1984). A recent moratorium has however led to a decline of cases: A 1987 estimate noted 287,000 cases heard by ALJs, of which 118,000 were disability related. Koch and Koplow, *supra* note 154, at 673-74 n.134.

[158] 20 C.F.R. § 404.970 (1988); *see* Koch and Koplow, *supra* note 154, at 704 n.220 (noting that Appeals Council caseload has risen from 50,000 cases in 1986 to approximatley 80,000 in 1988).

[159] 42 U.S.C. § 405(g) (1982); 21 C.F.R. § 404.955 (1988).

[160] *See, e.g.*, 11 OHA L. Rep. (SSA Publication No. 70-002, 1987) (containing SSA Appeals Council and ALJ decisions). This reporter's introduction states: "It should be noted that this service is not to be considered an authority which can be cited, but rather an informative aid which may lead to individual research."

The ALJs and the Appeals Council are not obliged to base their decisions on the agency's manuals[163] or other SSA policies not formally adopted by rule or in the Rulings. Nevertheless, manuals and other policies do affect the initial decisions and reconsideration requests made by claims examiners.[164] The differences in approach to the treatment of the manual could contribute to different outcomes and to the reversal rate.[165]

c) *Availability of Decisions*

Since 1975 however, the Appeals Council has published an Office of Hearings and Appeals Law Reporter (OHA) quarterly, together with a cumulative annual index.[166] This guide contains excerpts from some Appeals Council and ALJ decisions.[167] The Reporter is not intended however to have precedential effect. Rather, it is to be used only as an "information aid which may lead to individual research."[168]

The mere existence of the OHA Reporter creates the potential for a precedent-like effect to be accorded to reported decisions despite the disclaimer. This potential effect was realized in an Appeals Council decision affecting the Medicare program.[169] There, an ALJ relied on a reported Appeals Council decision to support his own decision that post-conviction behavior was to be considered a mitigating circumstance in a Medicare provider's suspension proceeding. On appeal, representatives of the Medicare program successfully persuaded the Appeals Council to overturn the ALJ decision and to alter the Council's earlier view. Although continuing to disclaim any precedential effect for its prior decision, the Appeals Council stated that its decisions reflect "the general policy of the Appeals Council."[170] Apart from this Reporter, the SSA does no other indexing of Appeals Council or ALJ decisions.[171] Most individual decisions are kept in the claimant's file.

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[161] 20 C.F.R. § 442.208 (1988); Koch and Koplow, *supra* note 154, at 688-91.

[162] 20 C.F.R. § 422.408 (1988); *see* Pacific States Gas & Elec. Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974) (emphasizing that substantive rulemaking binds adjudicators).

[163] The Social Security Administration's Program Operations Manual System (POMS) is comprised of standard SSA policies and operating standards.

[164] Social Security Hearings and Appeals, *supra* note 154, at 107; telephone interview with Richard Ross, Attorney Adviser, SSA Office of Hearings and Appeals (Nov. 1987) [hereinafter Ross interview]; *see* Koch and Koplaw, *supra* note 154, at 688 n.180 (noting that many ALJs "do not consider [SSA] rulings binding upon them, since [the rulings] are not promulgated via APA notice-and-comment rulemaking procedures"); *see also id.* at 689 (stating that by its own terms POMS manual is not directly applicable to ALJ or Appeals Council).

[165] Social Security Hearings and Appeals, *supra* note 154, at 107.

[166] *See, e.g.*, 11 OHA L. Rep. (SSA Publication No. 70-002, 1987) (reporting decisions and pertinent activity with respect to SSA).

[167] Ross interview, *supra* note 164.

[168] 11 OHA L. Rep. introductory statement (SSA Publication No. 70-002, 1987)

[169] *See* Appeals Council Decision (March, 1987—Texas case), 11 OHA L. Rep.

SSA maintains that the FOIA indexing and availability requirements apply only to decisions with precedential value and not to all of its ALJ and Appeals Council decisions.[172] SSA argues that to make available all decisions would be unduly costly and estimates that if all the decisions were made available, the cost would exceed ten million dollars annually.[173] Nevertheless, the General Accounting Office disputed the SSA's restrictive policy as inconsistent with judicial decisions.[174]

2. *Other Studies of SSA Practices*

The Administrative Conference of the United States (ACUS) recently recommended a change in the role of the Appeals Council.[175] Under this recommendation, the SSA Appeals Council would take a policy-oriented role when deciding cases and not serve merely to correct errors. To facilitate this change, the Council could exercise greater dis-

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at 9 (noting that ALJ specifically referred to a previous Appeals Council decision to support his decision).

[170] Appeals Council Decision (March 1987—Texas case), 11 OHA L. REP. at 9-10 n.1. Regulations to revise and incorporate a similar policy had been proposed at 51 Fed. Reg. 24,857, 24,868 (1986).

[171] Ross interview, *supra* note 164; Letter from Timothy D. Roberson to Margaret Gilhooley (Mar. 17, 1988); Letter to Ms. Sally Hart Wilson from John Percy (Nov. 27, 1984).

[172] *See* GENERAL ACCT. OFF., *supra* note 55, at 27-28 (noting Office of Hearings and Appeals position that "these [non-precedential] opinions are relevant only to the individual appeals out of which they arise and should not be relied upon or consulted in deciding subsequent cases"); 20 C.F.R. § 422.408 (beginning by stating "[p]recedent final opinions or orders").

[173] *See* GENERAL ACCT. OFF., *supra* note 55.

[174] GENERAL ACCT. OFF., *supra* note 55, at 27. GAO contends that FOIA requires all final opinions to be made available, regardless of precedential effect. The report also found SSA's position to be inconsistent with the decision in *National Prison Project v. Sigler*. National Prison Project v. Sigler, 390 F. Supp. 789 (D.D.C. 1975).

[175] ACUS Recommendation No. 87-7, *supra* note 36, § 305.87-7, *based on* Koch and Koplow, *supra* note 154.

cretion in deciding which cases to review.

This change would impact upon the precedential value of the Appeals Council decisions. Policy decisions would be distributed throughout the SSA system and made publicly available, possibly through a recognized reporting service.[176] Moreover, these policy decisions would be expected to influence the ALJs' decisions in other similar matters.[177] Lastly, should the new role of the Appeals Council fail to improve policy development and case handling performance, the value of having the Appeals Council would be in question.[178]

The ACUS study illustrates the relationship between the policy-making role of an appellate adjudicatory body and the precedential value of its decisions. Where decisions are not publicly available, the adjudicatory body serves largely in a case review capacity. An adjudicatory body that is to help in formulating policy to govern similar cases must perceive its role in policy-oriented terms. Decisions also have to be available in order to influence other decisionmakers and to be a source of guidance available to the parties involved in the proceedings.

Recognition of the precedential value of the Appeals Council decisions will eliminate the awkward characterization presently made of Appeals Council decisions. The Council currently states that its reported decisions are unofficial and not available for citation.[179] The Appeals Council cannot appropriately ignore inconsistencies in prior decisions when resolving similar issues in subsequent cases. Thus, the availability of prior decisions inevitably gives some precedential quality for the decisions.

Other SSA disability proceeding studies have analyzed the appropriateness of making prior decisions available as precedents. Disability determinations often involve judgmental questions in applying law to fact. The more "abstract terms" in the rules cannot convey a sense of how that judgment is to be used. Instead, "concrete examples" in the form of case-based precedents are "essential" and should be available as guidance.[180] The designation by SSA of well-written decisions as "models" can provide more specific guidance on matters not appropriately governed by rigid rules. In the absence of precedential materials, the process can seem "opaque" or "arbitrary" to the affected public, contributing to a poor selection of cases for appeal by attorneys. Lastly, court decisions reviewing SSA matters have found general questions which need a unified agency position.[181] The existence of these judicial findings suggests that cases are not the exclusively factual, individual determinations of unique issues suggested by the SSA.

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[176] ACUS Recommendation No. 87-7, *supra* note 36, § 305.87-7 (1)(a)(2), (1)(f).

[177] *Id.* § 305.87-7 (1)(a)(2).

[178] *Id.* § 305.87-7 (2).

[179] *See* 11 OHA L. REP. at 1 (discussing disclaimer in preface of Reporter).

[180] SOCIAL SECURITY HEARINGS AND APPEALS, *supra* note 154, at 109.

Giving Appeals Council decisions a wider precedential effect has repercussions. If all decisions are accorded precedential effect, the sheer number of decisions could create "cognitive overload."[182] Because selection of precedents would be necessary, the process is judgmental and would make the Appeals Council a policy institution.[183] The availability of judicial review in federal district courts nationwide would make it difficult to maintain a unified value to the Appeals Council precedents.[184]

V. SUMMARY AND ANALYSIS

A. Summary of Precedent Practices

This survey of agency programs indicates that the use of precedents has been limited. Only the SSA has a clearly articulated policy with respect to the precedential effect of its decisions, and that policy presently disclaims any precedential effects for the decisions of the SSA's highest appellate tribunal.[185]

The lack of precedential significance of decisions is reflected in the agencies' approaches to the indexing of the decisions. FmHA deferral decisions have not been nationally indexed or compiled in an accessible way.[186] SSA disability decisions also have not been made generally available, although a few cases are found in the OHA Law Reporter.[187] At FDA, decisions involving regulatory hearings are available if an individual makes a general FOIA request, and a general index of all the decisions is currently in production.[188] Although DOD does compile and index, the index is simply descriptive of each case and is not organized cumulatively by subject matter; cases are not highlighted for special significance. The DOD index reflects the view that the decisions are not the source of governing standards. Each decision is explained in terms of the governing DOD Directive, obscuring any influence a prior decision may have.[189]

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[181] *Id.*

[182] *Id.*; J. MASHAW, BUREAUCRATIC JUSTICE 201 (1983).

[183] *Id.*

[184] *Id.*; *see* Strauss, *Only Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1112 n.84 (1987) (summarizing procedure adopted by Department of Health and Human Services (HHS) requiring state officials to follow uniform national standards).

[185] *See supra* note 168 and accompanying text (discussing disclaimer in OHA Law Reporters).

[186] *See* Cunningham Letter, *supra* note 93 (stating that FmHA does not maintain a national index of its decisions).

[187] *See* Ross interview, *supra* note 164 and accompanying text (reiterating that editorial board selects cases to be published in OHA Reporter).

[188] Horton interview, *supra* note 118 and accompanying text.

To decide whether the restricted availability of decisions and limited use of precedents is proper, consideration is needed of the value of precedents in an administrative program. Analysis of the factors that may have contributed to the lack of the availability of decisions is also necessary.

B. Policies Supporting the Use of Precedents

1. Development of Standards

Adherence to precedents helps develop agency standards. These agency standards, in turn, serve to guide agencies in making decisions in a rational and principled manner.[190] The rationale for the acceptance of the delegation of power to administrative agencies rests in part on the expectation that the agencies will develop standards as the administration of a program continues.[191] Self-generated standards also provide a context for judging the reasonableness of agency action. Administrative precedents can serve a function similar to that of judicial precedents. They act as a constraint on the discretion of the decisionmaker and help legitimize the process.

In order for adjudications to help develop agency standards, the agency must record decisions which can be used as precedents. The availability of previous decisions can provide a framework for the further identification of standards, as well as reminding the agency of the need to make coherent sense of its decisionmaking. To facilitate this purpose, a test is needed which measures the agency's obligation to disclose and index decisions on a basis that is broader than the "precedential" test traditionally associated with the FOIA's requirements. The precedential test focuses too narrowly on the question of the agency's reliance on the decisions as precedents and the agency's use of the decisions for reference and guidance.[192] If the agency makes no use of the decision, the agency need not retain or index any of the decisions. Such a test does not seem to require an agency index decisions that restrict the agency's power. The agency should have to justify decisions, however, that change its past policies. Those outside the agency should have access to the agency's past decisions to raise issues about a change in policy.

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[189] *See supra* note 139 and accompanying text.

[190] H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR A BETTER DEFINITION OF STANDARDS 74 (1962); Frankfurter, *The Task of Administrative Law*, 75 U. PENN. L. REV. 614 (1927) (describing difference between rules and agency discretion); *see* Pittman, *ICC*, *supra* note 17 (noting that *stare decisis* might be too restrictive for agency required to give individual application, yet some control in form of standards based upon experience is needed). An absence of agency standards can lead to individual decisions based on bargaining. *See* T. LOWI, THE END OF LIBERALISM (1979).

[191] *See* Amalgamated Meat Cutters v. Connelly, 437 F. Supp. 737 (D.D.C. 1971).

2. *Notice and Guidance to the Affected Public*

Precedents can aid those outside the agency in understanding the agency's policies and in providing notice of these policies.[193] Those outside the agency can also benefit by having access to examples of decisions identified by the agency as leading or model cases. Examples of typical cases can help in case preparation and in selecting cases for appeal.[194] Those in the agency have a continuing exposure to its processes and its decisions. Those outside do not have the same familiarity with the cases. Thus, examples of decisions can put the outsiders on a more equal footing with those inside an agency.

3. *Value to the Agency*

An agency's use of precedents, together with an appropriate indexing system, can be part of an agency's effort to develop policy. Adjudications may involve novel issues not resolved by the statute or rules. Policy issues can arise that are not susceptible to a fixed rule. A model decision can provide guidance for lower-level adjudicators about handling the interrelated variables that can arise. If adjudications are to serve this policy role, the agency adjudicators, however, must recognize the policy dimensions of an issue. An ACUS recommendation recognized the need for the SSA to develop a policy formulation function of the Appeals Council.[195] Other agencies also should consider encouraging their adjudicatory appellate tribunals to formulate policy on emerging issues.

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[192] *See supra* notes 53-54 and accompanying text.

[193] The Supreme Court has recognized the guidance value of prior decisions to similar and analogous cases. *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975) (holding that NLRB advice and appeals memoranda, which conclude that complaints should not be filed, are discoverable by public).

[194] *Supra* note 180 and accompanying text.

[195] SOCIAL SECURITY HEARINGS AND APPEALS, *supra* note 154, at 109; Koch and Koplow, *supra* note 154, at 748-54, 798-820; *see* ACUS Recommendation No. 87-7, *supra* note 36, § 305.87-7(1) (recommending that SSA restructure Appeals Council

The use of precedents and indexes by agencies also reflects a judgment that with experience comes knowledge. Agency expertise comes from familiarity in dealing with issues and represents an institutionalized experience. Preservation of this experience in the context of adjudications requires keeping decisions accessible. Agencies cannot rely on fragile institutional and personal memory to record decisions. Personnel retire or leave with a change of administration; oral communications can be misunderstood or forgotten with time. Particularly in large programs, some written system of precedents may be needed simply to communicate to those involved. Also, because the federal record disposal laws lead to the warehousing and destruction of records unless a reason for preserving them is identified,[196] the agency itself should organize and preserve any lessons learned during adjudications.

C. *Difficulties in Expanding the Use of Precedents*

1. *Lack of General Significance*

Consideration is needed of the complicating factors that weigh against any general requirement that agencies index their decisions and regard them as precedents. Although these factors are important, a selective availability of more decisions on balance seems warranted. Decisions are not compiled and indexed because, some contend, the decisions concern only a particular fact pattern and, therefore, lack general significance. The case is only a routine application of law to facts.[197] Furthermore, the agency's rules may establish specific standards, which narrow the range of discretion in adjudications.[198]

Although many cases are undoubtedly routine and predominantly factual, it is unlikely that there are no cases of wider significance. Some cases may raise general policy issues or unexpected situations. Furthermore, although each case does have individual facts, there may

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and redirect institution's goals and operations away from merely processing cases towards improved organizational effectiveness).

[196] 44 U.S.C. § 3301 (1982); *see* FOOD & DRUG ADMIN., STAFF MANUAL GUIDE 2460.8 (Nov. 10, 1983) (stating that records are usually retained for five years).

[197] *See* Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681, 699 n.87 (1972) (referring to decisions by Appeals Council and stating that "[m]ost decisions, based upon a Council reaction to the totality of the often conflicting evidence in the record and its application of the uncertain congressional standards, are a borderline type not readily transferable to new fact situations").

[198] *See*, 32 C.F.R. §§ 155.6(f), 155.8 (1987) (detailing adjudication policy adhered to by DOD.

be recurrent patterns. The extent to which an agency views its cases as individual determinations is affected by the agency's willingness to recognize a resemblance among the issues presented and to resolve issues on the basis of a general principle. Thus, when agencies utilize precedents sparingly in their adjudications, there may be a need to examine the extent to which the agency exercises a policy role in the adjudicatory process. Finally, as mentioned earlier, examples of routine, model, and leading cases can provide guidance to agency the public.

2. *Overload and Burdens*

The availability and indexing of prior agency decisions may seem undesirable because to do so would be burdensome.[199] In large programs, the sheer number of decisions makes it impracticable to treat all decisions as precedents. Even in smaller programs, indexing of all decisions may make it difficult for users to distinguish routine decisions from ones of wider significance.[200]

This overload problem is serious; to deal with it effectively, a selective availability and indexing of decisions is necessary. Indexing should highlight the more significant cases. Selectivity, however, has its own difficulties. A question of judgment is involved in selecting which decisions will be made available and indexed. In making these determinations, the adjudicators may be able to play an important role in identifying decisions that are more than routine.[201]

Agencies will also be concerned about the costs and staffing burdens of expanded indexing and disclosure obligations. SSA estimated a ten million dollar annual cost; an estimate presumably based on an availability of all decisions.[202] Selective availability may increase the cost because of the greater professional judgment involved in selecting cases. Nonetheless, increasing the fairness of the process and developing a cohesive policy weigh in favor of these added costs.

3. *Dealing with Inconsistency*

Concern can arise that as decisions become available additional disputes will arise as to inconsistencies between the current matter and the prior resolution in other cases. Where a decision represents a policy change, the opening up of the issue through the availability of prior decisions produces a desirable result. The agency always needs to consider and address issues of inconsistency in policy and to have a rational justification for differences in treatment.[203] More problematical is the potential for disputes about inconsistency in handling claims with similar fact patterns. The resolution of such disputes involves having to consider and resolve specific factual questions, a particularly great burden in the large mass welfare programs.[204] When such issues arise, the focus of judicial review is ordinarily on the correctness of the decision at hand rather than the handling of other cases, at least absent a showing of abuse.[205]

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[199] SOCIAL SECURITY HEARINGS AND APPEALS, *supra* note 154, at 107.

[200] *See supra* note 138 and accompanying text.

[201] *See supra* notes 137-48 and accompanying text.

[202] *See* GENERAL ACCT. OFF., *supra* note 55, at 28 (elaborating that over 250,000 decisions are issued annually and to report them, OHA would have to delete personally identifying information and index issues included in each decision).

The selective availability of more decisions is not likely to provide a great number of cases that could potentially be raised as inconsistencies. The assurance of consistency in decisionmaking in large programs may need to be provided through management measures that examine the quality and consistency of decisions.[206] Still, the possibility that inconsistent decisions will not be considered, because of the burden of resolving them, remains an unsettling fact. The difficulty in obtaining copies of prior decisions may help to preclude a litigant from raising the issue and demonstrating an abuse.[207] Some balance between testing the inconsistency of decisions while at the same time reducing the burdens of handling large numbers of cases is needed. A random selection of routine cases should be included in the agency's index and made available to the public. In smaller programs, the program should make available and index a complete list of the routine cases, in addition to cases identified as significant. These measures would allow those outside the agency some possibility of detecting inconsistencies in the application of standards. An individual justice model may still justify precluding disputes about such discrepancies in results. The acceptability of that result should be tested in a setting that presents the hard case.[208]

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[203] *See supra* notes 22-23 and accompanying text.

[204] *See* Koch and Koplow, *supra* note 154, at 128-32 (describing reason why it is difficult to define and measure accuracy in SSA disability).

[205] *See* Davis v. Commissioner, 69 T.C. 716 (1978) (denying discovery of material relating to other taxpayers when "too nebulous" showing made a relationship to specific issues); Davis v. Commissioner 65 T.C. 1014, 1022-23 (1976) (finding treatment of other taxpayers by IRS to be generally irrelevant); *see* Gifford, *Need Like Cases Be Decided Alike? Mashaw's Bureaucratic Justice*, 4 AM. B. FOUND. RES. J. 985 (1983) (criticizing Mashaw's view of SSA decisional inconsistencies).

[206] Mashaw, *Management Side of Due Process*, 59 CORNELL L. REV. 772 (1974).

[207] Davis v. Commissioner, 65 T.C. 1014, 1022-23 (1976); *see* Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982) (stating that inconsistencies in decisions make it difficult for litigant to raise same issue).

4. *Administrative Structure*

A precedential and policy-oriented system has implications for the administrative structure of the adjudicatory process. In some programs, the agency may delegate final decisionmaking responsibilities to full-time adjudicators who do not have significant policy responsibilities.

The separation of the adjudication function from policy-making enhances fairness and integrity in adjudication. The separation does, however, complicate the development of agency policy on a coordinated basis.[209] The adjudicators, due to their limited policy-making role, also may be reluctant to reach the broader policy aspects of the issues arising in cases.

The agencies need to encourage adjudicators to deal with policy issues as they emerge. In addition, consideration is needed of the means to involve policy-making officials when adjudications raise major issues of policy which may serve as important precedents for future cases. One means of providing this input would be a discretionary review of important cases by the agency's head or a delegate with policy-making responsibility.[210] Such a review would focus on the policy aspects, rather than the factual issues but would serve as the final decision in the matter. Such a review would not be warranted in all cases. If the issues are merely factual and routine, or raise narrow policy questions, there is no need for this discretionary review. But, the procedure should be available on the occasions when significant policy questions do arise.

An additional reason for coordinating policy-making and adjudicatory responsibilities is that agencies sometimes establish policies through the issuance of manuals and statements of policies. However, when these policy statements are not issued through substantive rulemaking, they do not have the legal effect of a rule and, thus, do not have the same binding effect that a rule does.[211] Support for the policy and its applicability to the case needs to be considered when policy issues arise in adjudicatory proceedings. If the adjudicator finds the agency policy inappropriate for the facts of a particular case, the policy may remain effective for other situations. Questions about the appropriateness of a manual policy and the circumstances in which the policy is inapplicable can raise important questions for which discretionary review by the agency's policy official may be particularly important.

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[208] *See* Gifford, *supra* note 205, at 990 (pointing out that inconsistent results do not appear unfair to participants if they are unaware of differences in treatment).

[209] *See* Strauss, *supra* note 27, at 1256 (noting that top agency officials have wide range of decisionmaking power).

[210] *See Id.* at 1259-60, 1271 (maintaining that major issues should be decided by top agency officials); Freedman, *Review Boards in the Administrative Process*, 117 U. Pa. L. Rev. 546 (1969) (analyzing impact of review boards on administrative decisionmaking); *see also* Cass, *Allocation of Authority within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U.L. Rev. (1986).

[211] Pacific States Gas & Elec. Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974).

Due to the importance of decisions concerning the applicability of agency manuals, the index should take particular note of such decisions, whether or not they are reviewed by the agency head. For example, if a decision finds that an agency manual is not applicable to the facts of a particular case, other members of the public should be aware of the decision because of its value in understanding factors that limit the application of the agency's policy manual.[212]

V. NEED FOR A FRAMEWORK FOR PRECEDENTS: THE FOIA REQUIREMENTS

A. The Relevance of the FOIA Affirmative Disclosure Requirements

The FOIA affirmative disclosure requirements warrant re-examination in light of the reasons supporting the greater availability of agency decisions and precedents. At present, the FOIA requirements have not always led agencies to take affirmative steps to make available and index decisions. The agency practices surveyed above reflect different approaches to FOIA's requirements. None of these approaches is fully satisfactory. The statutory text could be read literally to require the indexing of all decisions and has support in the legislative history.[213] Requiring the indexing and availability of all decisions can be impracticable and without utility, particularly in large programs the size of the SSA program. The Attorney General's Manual provides support for not requiring the availability of all decisions when it is futile and without purpose.[214]

However, limiting the requirement solely to precedential decisions has drawbacks and has been criticized in court decisions.[215] A test that is dependent upon the precedential status of a case can lead to over-restrictive disclosure practices. Moreover, the precedential test is susceptible to several intrepretations. Agencies may define precedential decisions as only those decisions recognized by the agency as establishing definitive policy. Under the statute, an agency cannot rely on decisions as precedents unless they are indexed or notice is given.[216] The indexing obligation should not be confined to decisions within the ambit of this sanction. To do so limits the requirement to decisions that bind the public without reaching decisions that impose a standard or restriction on the agency.[217] The precedential test also has the objectionable feature of providing justification for completely failing to index and make decisions available. An agency does not have an indexing obligation if it regards all of its decisions as based on the facts of the case and does not retain any of the cases for reference in an accessible way. This result seems inconsistent with Congress' expectations in establishing the disclosure requirements. Congress seems to have assumed that the agency would have some precedents to guide its decisions and that such guidance would be afforded to those affected by agency action. The agency retention test can also discourage agencies from keeping decisions for future reference and, potentially, from developing policy on the basis of them.

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[212] *See supra* notes 161-62 and accompanying text (stating that Rulings are precedential and are used to announce whether agency will adhere to federal court decisions).

[213] 5 U.S.C. § 552 (a) (1982); see SENATE REPORT NO. 813, *supra* note 39, at 6 (noting that apart from exemptions, agencies must make available "all final opinions").

[214] *Supra* note 47 and accompanying text.

[215] *See, e.g.*, National Prison Project v. Sigler, 390 F. Supp. 789 (D.D.C. 1975) (rejecting contentions that only orders and opinions having precedential effect are subject to disclosure requirements).

If a precedential test is to be used, the test should encompass decisions of precedential significance that may be used by those opposing agency action as well as by the agency itself.[218] Determining the precedential significance of cases is not an easy matter though. It calls for anticipating the potential use by others in the future. The significance of the decisions relates to their use in similar and analogous cases and not simply identical ones. The precedential value of cases is not a static quality and can emerge and change with circumstances. The participant needs test suggested below as an alternative test may be easier to apply because it looks at significant differences between decided cases. Compliance with that test should also serve to identify decisions of precedential significance in its broader sense.

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[216] SENATE REPORT NO. 813, *supra* note 39, at 7 (noting that subsection (b) contains its own sanction regarding improperly indexed orders and opinions).

[217] National Prison Project v. Sigler, 390 F. Supp. at 793.

[218] H. REP. NO. 1497, *supra* note 46, at 2425, states:

> [s]ubsection (b) would help bring order out of the confusion of agency orders, opinions, policy statements, interpretations, manuals, and instructions by requiring each agency to maintain for public inspection an index of all the documents *having precedential significance* which would be made available or published under the law.

(emphasis added).

3. *"Participant Needs" Test for Availability*

The FOIA requirement should be read in light of the statutory text and the purpose of the indexing requirement identified by Congress in the legislative history, to afford the private citizen "the essential information to enable him to deal effectively and knowledgeably with the [f]ederal agencies."[219] The provision should not be read as requiring the indexing of all decisions when they are simply repetitive resolutions of the same issue. That type of indexing does not help participants in proceedings. Rather, the agency should selectively index cases that help participants in understanding how to participate effectively. In furtherance of this legislative aim, the "agency-recognized precedential" test should be supplemented by a "participant needs" test to determine which decisions are subject to the indexing requirements of FOIA and its related affirmative disclosure requirements.

In order to deal with the agencies effectively, the affected participant must have access, not merely to decisions that the agency intends to rely on as binding precedent, but also to model decisions, which provide guidance on how cases are typically decided and that can assist in the preparation of cases and appeals.[220] In order to provide this assistance, the agency should always include some decisions in its index. Therefore, the index should include decisions resolving any discrete type of issue, unless a subsequent case provides better guidance and becomes the "leading" case.

It is no answer that the decisions do not provide guidance because they do not influence other decisionmakers. Decisions always have value by providing an example of how decisions can be made. Where there is no typical pattern to the decisions, a greater selection may even be necessary in order to illustrate the variability in outcome. Adjudicators in the agency have the examples provided by their own prior decisions. Thus, in order to be on an equal footing, the affected public should have some access to prior decisions as well.

Additionally, the index should include current, routine decisions which are designated as such. This relates to meeting a "participant-needs" needs test. Routine cases provide examples of ordinary decisionmaking and give potential litigants guidance on what to expect. Furthermore, availability of routine decisions may detect inconsistency in decisions. As discussed above, there are limits on the ability of any adjudicatory system to deal with inconsistencies. Nonetheless, some opportunity should be available to detect clear abuses, even if it is a limited opportunity. Moreover, FOIA is concerned with the detection of any "secret law."[221] The availability of routine decisions helps safeguard this aim. Availability of routine decisions also refutes arguments that the agency's index of significant decisions was too selective.

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[219] Senate Report No. 1219, *supra* note 39, at 12; Senate Report No. 813, *supra* note 39, at 7.

[220] *See* Social Security Hearings and Appeals, *supra* note 154, at 107, 109 (discussing SSA precedent practices); Koch and Koplow, *supra* note 154, at 776-77 (suggesting that selective publication of significant decisions would promote consistency and policy integrity).

A "participant needs" test for indexing has implications for the manner in which the index is prepared and made available. An index that highlights significant decisions is more useful than one that indexes all decisions without sorting out the routine from the more significant.[222] Thus, the index should highlight leading cases and indicate their substantive content. The index should also be "current" and cumulatively cover decisions of continuing significance.

Ordinarily the index should focus on the final decisions of the highest appellate level, because these decisions are the ones expected to be influential. If, however, many decisions become final without review, or the precedential value of the appellate decisions is weak, examples of initial decisions should also be disclosed. Likewise, lower level decisions should be included if they are the only decision dealing with an issue or if they serve as a model decision.

C. *Conclusion and Recommendation*

The use of a participant needs test seems appropriate under the FOIA to achieve its underlying aims.[223] If the existing statute did not encompass such an obligation, a legislative change would be warranted. In addition, on policy grounds, the availability of decisions and the indexing obligation should be governed by a test that looks at the needs of the public for guidance and not solely at the precedential significance of the decisions. The agencies on their own initiative should provide for this broader measure of disclosure.

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[221] *See* Senate Report No. 813, *supra* note 39, at 7; House Report No. 1497, *supra* note 46, at 2424 (outlining purpose of index as preventing "a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which is not available to the citizen simply because he had no way in which to discover it"). The concept of "secret law" can be viewed as limited solely to undisclosed law that potentially binds or adversely affects the public. It is also possible to give it a broader meaning that encompasses an undisclosed policy. The Supreme Court left the question open in NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 156 n.22 (1975).

[222] *See* 5 U.S.C § 552(a)(2) (1982) (stating that each agency shall make rules available for public inspection); 32 C.F.R. §§ 155.1-.8, 286.11 (1987) (describing DOD's duties to publish and index materials and supplements).

[223] 5 U.S.C. § 552(a)(2) (1982).

Additionally, there may be indirect incentives for an agency to undertake a reasonable effort to index and make available decisions. As *Allison v. Block* indicates, courts, on occasion, may consider the lack of precedents as a factor when issues arise concerning the agency's choice between rulemaking and adjudication. In situations such as these, courts also should consider the adequacy of the agency's compliance with FOIA's requirements, because these requirements provide a congressionally-recognized means for agencies to report their unpublished decisions.[224] The agency also should be expected to make available and index its future decisions concerning the pertinent issue, if it is an important one. The availability and indexing of the decisions permits the parties to make their own determination, whether prior decisions have a precedential value that should be considered in reaching a rational decision in a particular case.

RECOMMENDATIONS

Set out below are recommendations which suggest the scope of the indexing and disclosure requirements that agencies should meet. Disclosure is keyed to the need for information that enhances participants' ability to knowledgeably participate in agency proceedings. The test effectuates the aims underlying the affirmative disclosure provisions of FOIA and should lead to a considerable expansion in the availability of decisions.

1. Agencies should index their decisions subject to the affirmative disclosure requirements of FOIA so as to assist development of agency standards and policies in respect to general issues and recurring questions. The test for determining the indexing and affirmative disclosure requirements of the FOIA should be the need for guidance on the part of the affected participants, not simply the precedential value of decisions relied on by the agency.

2. To promote this objective, agencies resolving disputes in adjudications on a limited record should maintain a current index of final decisions, which should include:

(a) decisions of recognized precedential value that bind other adjudicators unless overruled;

(b) decisions consulted for reference or research or their persuasive merit by those in the agency involved in deciding cases or in bringing them or in developing guidelines to reflect the decisions;

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[224] 5 U.S.C. § 552 (a)(c) (1982).

(c) decisions establishing standards and criteria for handling similar cases or establishing limits and restrictions on the agency;

(d) the initial or leading cases dealing with any identifiable issue that is not frivolous;

(e) the principal cases dealing with recurrent cases and illustrating the factors affecting decisions;

(f) the principal cases identifying exceptions to the general pattern of resolving recurrent cases;

(g) the principal cases resolving purported inconsistencies in policies and prior decisions or overruling prior decisions;

(h) the principal cases interpreting or clarifying the agency regulations;

(i) the cases resolving questions about the scope or validity of an agency policy not adopted by rule and representative cases finding such a policy not applicable to the facts of a particular case; and

(j) the principal cases resolving questions of general principle or otherwise regarded as significant.

3. The index should also include all, or a random selection, of routine cases, identified as such, with a general indication of subject matter.

4. The index should be made of the decisions of the highest appellate body ordinarily deciding cases. The decisions of the initial level decisionmaker should be indexed in accordance with paragraphs two and three, if a large number of initial decisions are not subject to appellate review or if the initial decision provides the only guidance on a matter covered by paragraph two.

5. The existence of the index for unpublished decisions should be indicated in both the agency's FOIA regulations and procedural or substantive regulations governing the specific program. The agency should endeavor to make the index known and readily available to those affected by agency decisions.

Reviewability of Visa Denials by Consular Officers

Report for the
Administrative Conference
of the United States

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College of Law

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United States consulates abroad routinely shuffle passengers on Spaceship Earth by issuing or denying visas to foreign applicants. Consular decisions often have an acute impact on individuals and families. The volume of visa applications is huge. In 1988, for example, United States consulates issued 391,834 immigrant visas and 8,679,709 nonimmigrant visas,[1] figures which in a typical year would represent about 90% of all applications.[2] These figures often tell only half the story about the significance of the visa process; the other half involves the concerns of family members, prospective employers, educational institutions and others in the United States and abroad who may have a stake in whether a foreign applicant receives a visa. Moreover, new laws often increase the number of cases subject to the exercise of consular discretion.[3] Not surprisingly, given the increasing number of persons affected, a light industry of commentary flourishes, geared very often to the issue of excluding aliens for national security or ideological reasons.[4] The analysis that follows,

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[1] United States Department of State, Bureau of Consular Affairs, Report of the Visa Office 1988, at 18 (1989) [hereinafter cited as Visa Report]. Appendix A reproduces graphic summaries from the Visa Report that show leading immigrant and nonimmigrant visa issuances by country, consular post, country of birth/chargeability (immigrant visas), and nationality (nonimmigrant visas).

[2] *See* T. A. Aleinikoff & D. Martin, Immigration: Process and Policy 211 (1985), citing figures for 1983. Although the Visa Office in the State Department publishes figures on numbers of applications pending for visas and issuances, it generally does not publish figures on denials. The 10% denial rate estimated by Aleinikoff and Martin is, however, consistent with comparative information given to the author during the field study described in Part IV. The Department of Justice, in accord, estimates a 9.5% denial rate. ("The annual volume of visa denials is in the neighborhood of 42,700 for immigrant visa applications and 825,000 for nonimmigrant visa applications"). Letter from Robert S. Ross, Jr., Executive Assistant to the Attorney General, to Marshall J. Breger, Chairman, Administrative Conference of the United States (Oct. 13, 1989).

[3] For example, the Immigration Amendments of 1988, Pub. L. 100-658, 102 Stat. 3908 (1988) extend a program for increased admission of aliens from countries underrepresented in the population because of national quotas in earlier legislation. The Immigration Reform and Control Act of 1986, Pub. L. No. 99-603. 100 Stat. 3359 (1986) [hereinafter cited as IRCA] amends the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163, 8 U.S.C. §§ 1101-1557 (1982 & Supp. IV 1986) [hereinafter cited as INA], to provide amnesty, that is, a legalized status for certain classes of undocumented aliens residing in the United States. As amnesty recipients become permanent resident aliens or citizens and seek to bring in their relatives, applications for immigrant visas are expected to increase. State, Dec. 1988, at 9, col. 1. IRCA also provides that an alien who has at any time failed to maintain lawful status in the United States, other than

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through no fault of his own or for technical reasons, may no longer seek lawful permanent residence in the United States, but only by applying for an immigrant visa at a consular post abroad. 8 U.S.C.A. § 1255(c)(2) (1982 & Supp. IV 1986). The Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537, broaden the consul's power to exclude aliens who have obtained a visa by means of "sham" marriages to American citizens, even if they are resident aliens returning from visits abroad, on the basis of fraud or willful misrepresentation of a material fact. Government regulations have also shifted adjustment-of-status cases from the Immigration and Naturalization Service (INS) of the Department of Justice to the consulates. See Paparelli & Tilner, *A Proposal for Legislation Establishing a System of Review of Visa Refusals in Selected Cases*, 65 Interpreter Releases 1027, 1031 (1988).

[4] *See, e.g.*, Committee on Immigration and Nationality Law, Association of the Bar of the City of New York, *Visa Denials on Ideological Grounds: An Update*, 8 Seton Hall Legis. J. 249 (1985). Helton, *Reconciling the Power to Bar or Expel Aliens on Political Grounds with Fairness and the Freedoms of Speech and Association: An Analysis of Recent Legislative Proposals*, 11 Fordham Int'l L.J. 467 (1988); Mann, *Monopoly in the Marketplace: The Ideological Denial of Visas*, 9 Law & Pol'y 417 (1987); Neuborne & Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 Wm. & Mary L. Rev. 719 (1985); Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 Harv. L. Rev. 930 (1987); Tilner, *Ideological Exclusion of Aliens: The Evolution of a Policy*, 2 Geo. Immig. L. J. 1 (1987); Torrence, *Ideological Exclusions: A Prior Restraint Analysis*, 11 Hastings Comm/Ent L.J. 335 (1989); Voigt, *Visa Denials on Ideological Grounds and the First Amendment Right to Receive Information: The Case for Stricter Judicial Scrutiny*, 17 Cum. L. Rev. 139 (1986); Comment, *Immigration and the First Amendment*, 73 Calif. L. Rev. 1889 (1985); Comment, *Ideological Restrictions on Immigration*, 8 U.C. Davis L. Rev. 217 (1975); Note, *First Amendment and the Alien Exclusion Power--What Standard of Review?* 4 Cardozo L. Rev. 457 (1983); Note, *First Amendment Limitations on the Exclusion of Aliens*, 62 N.Y.U. L. Rev. 149 (1987), Note, *Free Speech and the Right of Entry into the United States: Legislation to Remedy the Ideological Exclusion Provisions of the Immigration and Naturalization Act* [sic -- apparently referring to the Immigration and *Nationality* Act], 4 Am. U.J. Int'l L. & Pol'y 443 (1989); Note, *National Security Visa Denials: Delimiting the Exercise of Executive Exclusion Authority Under the Immigration and Nationality Act*, 28 Va. J. Int'l L. 711 (1988).

Federal legislation enacted in 1987 provides that no alien who applied for a visa during 1988 might be denied one nor be excluded from admission "because of any past, current, or expected beliefs, statements or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution. . . ." Pub. L. 100-204, § 901, 101 Stat. 1399 (1987). In 1988 Congress extended this provision for two years, until 1991, but limited it to non-immigrant visa applicants. Pub.

however, is not specifically limited to denials of visas for reasons of national security or ideology.

On a legal landscape populated with "orphan applicants," "mustangs", "munchkins," "visa shoppers" "refusal overcomes" and the notorious "consular absolutists," a colorful vocabulary adds a superficial sparkle to an otherwise sobering debate concerning global freedom of movement. The actual and prospective influx of aliens engages profound social concern about the future of the national community"[5] and the nation's role in the global

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L. 100-461, § 555, 102 Stat. 2268 (1988). *See also* American-Arab Anti-Discrimination Committee v. Meese, 714 F. Supp. 1060 (C.D. Cal. 1989) (declaring certain provisions of § 901 and the INA unconstitutional that have the effect of curtailing the First Amendment rights within the United States of members of the Palestinian Liberation Organization (PLO)).

The exclusion of alien speakers persists. *See, e.g.*, Wash. Post, April 15, 1989, at A8, col. 1 (denial of visas to two Heads of State, Fidel Castro and Daniel Ortega, to permit them to speak to the American Society of Newspaper Editors).

[5] The existence of a national community is relevant also to the communitarian theory of a correlation between particular rights of aliens and the strength or closeness of their attachment to the country. *See* Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1 (1984); Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. Pitt. L. Rev. 165 (1983); cf. Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. Pitt. L. Rev. 237 (1983). For a rather narrow analysis of alien exclusion issues that focuses only on the national community without considering international dimensions, *see* Bosniak, *Exclusion and Membership: the Dual Identity of the Undocumented Worker Under United States Law*, 1988 Wisc. L. Rev. 955. The reality of a national community in a functional sense relevant to immigration policy is, however, controversial. It is said, to the contrary, that the United States may be less of a community than a politically and economically organized mixture of communities and lifestyle enclaves.

A "community" has been defined as "ongoing associations of men and women with some special commitment to one another and some special sense of their common life." M. Walzer, Spheres of Justice: A Defense of Pluralism and Equality 62 (1983). A more complete definition of "community" is:

> a group of people who are socially interdependent, who participate together in discussion and decision making, and who share certain *practices* (which see) that both define the community and are nurtured by it. Such a community is not quickly formed. It almost always has a history and so is also a *community of memory*, defined in part by its past and its memory of its past.

A "lifestyle enclave", on the other hand, community. In the national debate, immigration often becomes an issue of defining or even preserving the body politic.

The process for reviewing consular denials of visas to foreign applicants is particularly controversial. This study will discuss the general review process, with a focus on administrative and judicial reviewability, and will offer several recommendations for improving the process.

The general review process relies on international, constitutional, federal statutory and administrative law, as well as Departmental guidelines. These normative sources are interdependent. For example, the term "review" connotes a coordinated mix of administrative and judicial review, whereas the capacity of consular discretion to affect individual rights raises issues of constitutional rights, and the extraterritorial circumstances of consular discretion engages conventional and customary international law. What follows is largely an analysis of this complex of authority, supplemented by a summary of the author's interviews in Mexico, China, Poland and the United Kingdom and his observations of on-line consular adjudications in Mexico and China. These interviews and observations are too limited to provide an empirical basis for analysis, but do reflect salient aspects of the actual process of exercising and reviewing consular discretion. The study concludes with a set of recommendations.

I. The Statutory and Administrative Process of Admitting and Excluding Aliens

In exercising a qualified right to admit or exclude aliens, States normally apply a mix of two systems of control. Under the *insular-Western Hemispheric* system a State relies

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> is formed by people who share some feature of private life. Members of a lifestyle enclave express their identity through shared patterns of appearance, consumption, and leisure activities, which often serve to differentiate them sharply from those with other lifestyles. They are not interdependent, do not act together politically, and do not share a history. If these things begin to appear, the enclave is on the way to becoming a community. Many of what are called communities in America are mixtures of *communities* in our strong sense and *lifestyle enclaves*.

R. Bellah, R. Madsen, W. Sullivan, A. Swidler & S. Tipton, Habits of the Heart 333, 335 (1985). Contemporary "Cities on the Hill" have also been described as "intentional communities." H. Berman, The Interaction of Law and Religion (1974).

on the gateway or front-end grant or refusal of permission to enter its territory. The *continental* (that is, the continental European) system, on the other hand, relies on residence control involving the attribution of immigration status to all resident aliens, the attachment of restrictions and other consequences to that status, and, typically, a requirement of personal identifications and work permits.[6] Exit or departure controls supplement the permit system. During the last fifty years, there has been a growing perception that a mixture of the two systems of control works best, a modest trend toward adoption of the continental system of residence permits, and an expanded role of international law in controlling immigration.[7]

The United States applies an insular-Western Hemispheric system of control, but requires identification and registration as well. The United States Constitution provides no express grant of authority to control the entry of foreigners, although the Commerce Power and the power to establish an uniform rule of naturalization[8] bear on immigration. Instead, Congress has relied primarily on what the courts have described as "inherent" powers, to be discussed later, to control immigration. Congress has also relied at times on its Commerce Power. The Immigration and Nationality Act of 1952 (INA)[9] delegates to the Executive the authority to exclude and deport aliens according to substantive provisions for eligibility and prescribed procedures.[10] The Immigration Reform and Control Act of

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[6] Plender, *Recent Trends in National Immigration Control*, 35 Int'l and Comp. L. Q. 531, 535, 550-51 (1986) (the author formulates the distinction between "insular" and "continental" systems of control, the former of which is slightly modified here). *See also* Wolf, *Entry and Residence*, in The Legal Position of Aliens in National and International Law 1873, 1874 (J. Frowein and T. Stein eds. 1987).

[7] Plender, *id.* at 535; Wolf, *id* at 1874.

[8] U.S. CONST. art. I. § 8, cl. 3, 4.

[9] INA, *supra* note 3.

[10]

> "[E]xclusion" means preventing someone from entering the United States who is actually outside of the United States or is treated as being so. "Expulsion" means forcing someone out of the United States who is actually within the United States or is treated as being so. "Deportation" means the moving of someone away from the United States, after his exclusion or expulsion.

1986 (IRCA),[11] *inter alia* establishes post-entry, more or less "continental" procedures for verifying employment eligibility that affect citizens and aliens alike, and provides for study of the feasibility of validating social security numbers and avoiding counterfeit social security cards.

The INA expresses annual numerical limitations on alien admissions, provides grounds for their exclusion and deportation in detail, and establishes visa classes.[12] The interpretation and application of these quotas and grounds for exclusion have generated a vast jurisprudence that is generally beyond the scope of this study, but some examples

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Kwong Hai Chew v. Colding, 344 U.S. 590, 596, n. 4 (1953).

An alien has "entered" the United States if he or she has been lawfully admitted or has physically entered unlawfully by evading the prescribed process. *See* 8 U.S.C. § 1101(a)(13); Matter of Pierre, 14 I & N Dec. 467 (Bd. Immig. App. 1973).

The controversial and somewhat fading distinction between "exclusion" and "deportation" has important consequences involving due process. Consular decisions to deny visas are generally nonreviewable or are subject to only very limited reviewability. An alien arriving at the border or other port of entry is, however, entitled to an exclusion proceeding if the INS detains him or her for further inquiry. In a deportation proceeding, that is, after an alien's "entry" into the United States, he or she is entitled to the formalities of due process. In an exclusion proceeding, on the other hand,

> [n]otice is not required in any meaningful sense; rather, the applicant need only be informed of the issues confronting him at some point in the hearings and be given a reasonable opportunity to meet them. The right to confrontation is not required, although depositions may be ordered if evidence is essential. Oral argument is not provided for by statute or regulation. Oral presentation of evidence is provided for, as is a limited right of cross-examination and disclosure of opposing evidence. The right to retain counsel, to a determination on the record, and to a statement of reasons are protected, much as they are in deportation cases.

Verkuil, *A Study of Immigration Procedures*, 31 U.C.L.A. L. Rev. 1141, 1160 (1984). *See also* Appendix F.

[11] IRCA, *supra* note 3, primarily provided for sanctions against employers of undocumented aliens, legalization (or "amnesty") of resident or previously residing undocumented aliens, a special program for agricultural workers, financial and other support for the Border Patrol, and a prohibition on adjusting the status of most undocumented aliens other than under the one-time only amnesty program.

[12] INA §§ 201, 202, 203, 212, 8 U.S.C. § 1151, 1152, 1153, 1182; 22 C.F.R. § 41.12 (1988). Appendix B lists immigrant and nonimmigrant classes.

relevant to the core discussion of reviewability will appear throughout this study.

The INA requires most persons seeking to enter the United States to obtain a visa.[13] This requirement had its origin as an emergency security measure during World War I.[14] Ordinarily, the alien must apply to a consulate in the home district, defined by the State Department, in which he or she resides or, if the applicant resides in Taiwan, to an office of the American Institute in Taiwan.[15] An alien temporarily in the United States is considered to be a resident of the consular district of last residence abroad.[16] At the direction of the State Department or discretionarily, a consular officer may also accept an application for a visa from a non-resident of a consular district who is "physically present" there.[17] The availability of this alternative jurisdictional basis is especially important to "orphan applicants,"[18] who cannot apply for a visa in their home district either because of a fear of persecution there, without technically being a refugee, or simply because there is no United States embassy or consular post in their home district. Applicants for nonimmigrant visas may also apply by mail to their home consular districts even if they are not physically present there, so long as they are able to waive a personal appearance before a consular officer of the home district.[19] A visa section where an application is filed, other than in the applicant's home district, normally cables or writes the home district for background information.[20] In this way inter-consular communications about an applicant help detect questionable cases of visa shopping or multiple-consulate shopping.

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[13] INA §§ 211 (a), 212 (a)(20)(26), 8 U.S.C. §§ 1181 (a), 1182 (a)(20)(26). Exceptions include temporary visitors from Canada or Mexico in possession of "border crossing card[s]," refugees, permanent resident aliens returning from visits abroad, in transit passengers, parolees, and tourists from designated countries under a pilot program established by IRCA, *supra* note 3, at § 313. Under the Visa Waiver Pilot Program for Certain Visitors, whereby tourists from any of up to eight designated countries seeking entry for 90 days or less may conditionally receive a waiver of the visa requirements in INA § 212(a)(26)(B). INA § 217, 8 U.S.C. § 1187. The Attorney General and Secretary of State jointly designate pilot program countries on the basis of low nonimmigrant visa refusal rates for nationals of those countries. INA § 217(c), 8 U.S.C. § 1187(c). Designated countries began with the United Kingdom and Japan and now include, in addition, France, Italy, the Netherlands, Sweden, Switzerland and West Germany. *See generally* Immigration and Naturalization Service, Travel Without a Visa: A Guide for the Travel Industry (1988). For observations about the program, see *infra* text accompanying note 349.

[14] Joint Order of the Department of State and the Department of Labor, July 26, 1917, in Laws Applicable to Immigration and Nationality 1042 (1953). *See also* Public Safety Act of June 20, 1941, ch. 209, 55 Stat. 252 (1941-42), which directed consular officers during World War II to deny a visa to any alien who sought entry into the United States to engage in activities that would endanger the public safety.

[15] 22 C.F.R. §§ 41.101, 42.61 (1988).

[16] 22 C.F.R. § 42.61 (a) (1988).

[17] 22 C.F.R. §§ 41.101 (a), 42.61 (a) (1988).

Although the State Department does not encourage out-of-district visa shopping, it does encourage consular officers to exercise common sense in processing out-of-district applicants in order to help implement a fundamental policy of giving all aliens an opportunity to apply. State Department policy explicitly presumes that consular officers will seldom reject applicants merely on the basis of non-residence in a particular district.[21] Consular posts do not always comply with this policy, however. As an example of considerable importance, the Vancouver, Canada post has at times virtually closed its doors to orphan and other nonresident alien applicants and has barred or attempted to bar the accessibility of attorneys to the process.[22]

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> "Orphan" immigrant visa applicants are those applicants who cannot apply for an immigrant visa in their home country or country of last residence because either no consular post exists in the home country or country of last residence or because [sic] the applicant cannot return to such place for other reasons.

Pederson, *Representing Clients Before Consular Posts in the Context of Consular Absolutism*, in II Immigration and Nationality Law, 42nd Anniversary Symposium of the American Immigration Lawyers Association, at 296, 304, n.6 (1988).

[19] Foreign Affairs Manual, III Immigration Law and Procedure, App. J-472, N3.1; J-474, N.3 (C. Gordon & S. Mailman eds. 1988).

[20] *Id.* at J-473, PN3.2-3.5.

[21] *Id.*, Appendix J-471, N2.1.

Related to visa or consulate-shopping is the sub-issue of consular officer-shopping. Within a single visa section of an embassy or consulate abroad, consular officers sometimes establish mutually different reputations for either leniency or harshness. Applicants therefore attempt to learn which officers are more apt to issue visas, and try to arrange themselves in line for an adjudication or otherwise set things up for processing by a relatively lenient officer. Rules providing for greater uniformity or consistency among officers would be a check on this localized version of visa shopping.

An "advance parole" program ensures orphan applicants and others residing in the United States a right of return after they have traveled to a third country to interview. The program thereby assures foreign authorities that, if they allow a third country national to apply for a visa in a U.S. embassy or consulate, the applicant will be able to return to the United States afterward. To be eligible for the program, an applicant must show both that he or she cannot return to the home district and that the third country where a consular interview based on "physical presence" is to take place will bar admission without a "guarantee" that the applicant will be allowed to reenter the United States after the interview.[23]

An alien may apply for either an immigrant visa (for permanent residency) or a nonimmigrant visa (for temporary residency). The issuance of either type of visa is subject to 33 grounds for exclusion ("qualitative restrictions") that have been said to constitute "a magic mirror, reflecting the fears and concerns of past Congresses."[24] Intending immigrants are also subject to numerical limitations and preferences ("quantitative restrictions"),[25] whereas nonimmigrants are subject only to the qualitative restrictions and the classification system listed in Appendix B. An applicant is presumed to be an immigrant "until he establishes to the satisfaction of the consular officer"[26] entitlement to nonimmigrant status. The burden of proving eligibility for either type of visa is on the applicant.[27]

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[22] Telephone interview with Robert A. Free, Visa Practice Committee, American Immigration Lawyers Association (Jan. 6, 1989), and documents from Mr. Free concerning complaint to Visa Office of the Department of State from Washington State Chapter, American Immigration Lawyers Association (on file with the author).

[23] INS, Operations Instruction 212.5(c), INS Memorandum, Feb. 20, 1987.

[24] Lennon v. INS, 527 F.2d 187, 189 (2d Cir. 1975).

If the applicant is seeking an immigrant visa or, exceptionally, a nonimmigrant visa, he or she (the "beneficiary") must also enlist the sponsorship of a close relative who is either a U.S. citizen or permanent resident alien, or an actual or potential U.S. employer. The latter then files a petition with the Immigration and Naturalization Service (INS) of the Department of Justice to establish the requisite family relationship or to acquire labor certification, as the case may be. On approval of this petition, the INS transmits the papers to the appropriate embassy or consulate abroad as a prerequisite to the visa application.[28] Although consular officers are primarily responsible for applying grounds of exclusion, they may also redetermine the validity of the family relationship described by the applicant.[29] Because the issuance of immigrant visas per year is numerically limited by law, applicants are also subject to a numerical control system.[30]

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[25] An immigrant may qualify as an immediate relative or special immigrant, without an annual ceiling on numbers. If not, he or she must qualify under one of seven preference categories: First: unmarried sons and daughters over 21 years of age of United States citizens; Second: spouses and unmarried sons and daughters of permanent resident aliens; Third: members of the professions or persons of exceptional ability in the sciences and arts; Fourth: married sons and daughters of United States citizens; Fifth: brothers and sisters of United States citizens over 21 years of age; Sixth: skilled and unskilled workers in short supply in the United States; Seventh: non-preference immigrants. INA § 203(a)(1)-(7), 8 U.S.C. § 1153(a)(1)-(7) (1982). *See* Appendix B.

[26] INA §§ 214(b), 8 U.S.C. §§ 1184 (b).

[27] INA § 291, 8 U.S.C. § 1361.

[28] INA § 204(a)-(b), 8 U.S.C. 1154(a).

[29] 22 C.F.R. §§ 42.41, 42.43 (1988).

Consular officers have exclusive authority within the Department of State to issue or deny a visa; even the Secretary of State cannot reverse their decisions.[31] Immigrant and nonimmigrant applicants alike have the burden of proving "to the satisfaction of the consular officer" that they are eligible to receive a visa. On the other hand, consular discretion is explicitly limited. The consular officer may deny a visa only when he or she knows or has "reason to believe"[32] that the applicant is ineligible to receive a visa. "Reason to believe" requires that "a determination [be] based upon facts or circumstances which would lead a reasonable person to conclude that the applicant is ineligible. . . ."[33] Therefore, the "satisfaction of the consular officer" is defined by a reasonable person standard, according to which the officer has substantial, but limited discretion. The State Department's Foreign Affairs Manual guides, but does not control, consular discretion during the adjudication of an application, that is, during the procedure for determining an applicant's eligibility for a visa. Consular officers adjudicate an application by requesting documentation and interviewing the applicant, if physical appearance has not been waived by regulatory law.[34]

An interview with the consular officer is the "most significant part of the immigrant visa issuing process."[35]

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[30] *See* Appendix C.

[31] INA § 104(a), 8 U.S.C. 1104(a); for a global comparison of discretion to permit or refuse entry, *cf.* Wolf, *supra* note 6, at 1876-79. *But see* discussion about the use of para-consular assistants and Civil Service visa examiners, *infra* text accompanying notes 266-67.

[32] INA § 221(g), 8 U.S.C. § 1201(g).

[33] 22 C.F.R. § 40.6 (1988).

[34] The consular officer may waive the requirement of a personal appearance for children under 14, foreign and international organization officials and diplomats, some temporary visitors, transits, aircraft crewmen, and otherwise in the national interest or because of an applicant's experience of hardship or other unusual circumstances. 22 C.F.R. § 41.102 (1988).

[35] Foreign Affairs Manual, *supra* note 19, at J-721, PN6.

Normally, the adjudication of an application for an immigrant visa is objective and formal, the family relationship or labor certification either exists or it does not, and the applicant either overcomes the grounds for exclusion or does not. The greatest number of refusals of immigrant visas involve either INA §221(g)[36] for insufficient documentation or 212(a)(15) for likelihood "at any time to become public charges"[37] after entry.

Adjudication of an application for a nonimmigrant visa necessarily relies on a determination of an applicant's intentions and good faith, so as to determine particularly that the applicant will leave the United States before a visa expires.[38] In making this determination, critical factors may include family employment and financial ties at home and any unsuccessful previous attempts by the applicant to obtain an immigrant visa.[39] During the adjudication, the face-to-face interview is critical; the applicant's documentation is marginal. Most refusals of nonimmigrant visas are under INA §§ 221(g) and 214(b),[40] the latter for failure to overcome the presumption that the applicant is an intending immigrant, that is, the presumption that the alien does not intend to return home from the United States upon the expiration of his or her visa. Applicants may overcome this presumption by showing family or social-economic ties to the local community which are sufficiently strong to persuade the consular officer that their projected stays in the United States will be temporary. A nonimmigrant visa "shall be considered refused"[41] if an applicant fails to execute an application after being informed by the consular officer of a ground of ineligibility. Applicants may also be refused under § 212(a).[42]

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[36] INA § 221(g), 8 U.S.C. 1201(g).

[37] INA § 212(a)(15), 8 U.S.C. § 1182(a)(15).

[38] T. A. Aleinikoff & D. Martin, *supra* note 2, at 272.

[39] C. Gordon & E. Gordon, Immigration and Nationality Law 3-38 (student ed. 1980).

[40] INA §§ 214(b), 221(g), 8 U.S.C., 1184(b), 1201(g).

[41] 22 C.F.R. § 41.121(b) (1988). The terms "refused" and "denied" are used interchangeably in this study.

On approval of an immigrant visa, a consular officer issues completed Forms OF-230 (Application for Immigrant Visa and Alien Registration), and OF-155A (Immigrant Visa and Alien Registration).[43] INS approval of these forms and issuance to the alien of the well-known "green card" (Alien Registration Receipt Card, Form I-551) indicate the applicant's compliance with requirements of the INA and can serve as a sort of work permit and reentry document.[44] On approval of a nonimmigrant visa, the consular officer will stamp a visa into the applicant's passport for either a single entry or multiple entries. The INS will later staple an endorsed Form I-94 (Arrival-Departure Record) into the passport.[45] Form I-94 is intended to be surrendered upon the alien's departure from the United States.

Issuance of a visa is, however, no assurance of permission to enter the United States. A visa is, instead, more of a clearance to request admission by the INS at the border or other port of entry. Thus, prior to the applicant's entry, the consular officer or the Secretary of State may revoke an immigrant's visa, "in his discretion."[46] Second, a "double-check" system subjects an alien to a de novo inspection and determination of admissibility by the INS at the border or other port of entry.[47] Only about 3% of all visas are cancelled, according to estimates by consular officers with whom the author spoke.

It seems strange that issuances of visas, but not denials, are subject to redetermination. The INS may detain any arriving alien for further inquiry if he or she does not appear "to be clearly and beyond a doubt entitled to land" in the United States. After limited exclusion proceedings, the INS may issue an exclusion order barring the alien from entry.[48] An alien can be refused entry--"kickbacked" in INS-consular jargon--for reasons that the consular officer may have overlooked, excused or could not have known. Many, if not most "kickbacks," are seeking to enter with a non-immigrant, "B-2" (tourist) visa. The INS might kick back an alien for a number of reasons which would have been difficult, if not impossible, to establish in the embassy or consulate: having no money or return tickets, having only one change of clothing; having drugs in a suitcase; having mostly American-label clothes, but no computerized record of previous visas (showing probability, in some circumstances, of past illegal entry); having no proof of home residence; being in possession of a drivers' license issued in the United States and (again, showing a sign of past undocumented residence); or even expressing intent to reside in an area characterized by the presence of undocumented aliens, coupled with other suspicious aspects. The INS records a kickback on Form I-275 (Notice of Visa Cancellation or Border Crossing Card Voidance).

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[42] INA § 212(a), 8 U.S.C. 1182(a).

[43] 22 C.F.R. § 42.73 (1988).

[44] T. A. Aleinikoff & D. Martin, *supra* note 2, at 272.

[45] 22 C.F.R. § 41.113(a), (f) (1988).

[46] INA § 221(i), 8 U.S.C. § 1201(i).

[47] INA § 221(h), 8 U.S.C. § 1201(h).

The "reentry doctrine"[49] requires aliens to submit to border checks and face refusal of entry each time they travel abroad and return to the United States, as if they were entering the country for the first time. In practice, few aliens with visas are excluded at the border or other port of entry.

An alien may thus be subject to exclusion by a consular officer, by an immigration inspector at the border or other port of first entry, or by an inspector when he or she attempts to reenter the United States after a trip abroad. An issue of exclusion may also arise in deportation proceedings, during an attempted adjustment of status, or in naturalization proceedings.

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[48] INA §§ 235(b), 236, 8 U.S.C. §§ 1225(b), 1226.

[49] United States ex rel. Volpe v. Smith, 289 U.S. 422 (1933). In Rosenberg v. Fleuti, 374 U.S. 449 (1963), the Supreme Court narrowed the doctrine to allow reentry if a trip abroad was "innocent, casual and brief" and therefore not "meaningfully interruptive" of the alien's permanent residence in the United States. *Id.* at 461, 462. Section 315(b) of IRCA, *supra* note 3, amends INA § 244(b), 8 U.S.C. § 1254(b) by adding the following codification of the *Fleuti* rule: "An alien shall not be considered to have failed to maintain continuous physical presence in the United States . . . if the absence . . . was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence."

The INS may waive most of the grounds[50] for excluding nonimmigrants and, in exceptional circumstances "parole"[51] them into the United States despite an unwaivable ground of exclusion, for example to enable an alien to obtain urgent medical care, to enable the alien to appear as a witness in criminal litigation, or after an alien is detained, to provide for his or her release pending an exclusion hearing.[52] Even if a parolee is already in the United States, the law limits constitutional protections as if he or she were an excluded alien at the border.

The McGovern Amendment of 1977[53] places a burden on the Secretary of State to overcome a presumption established by the Amendment that a waiver of a denial under INA § 212(a)(28) should be granted in instances where the denial has been based on membership in or affiliation with certain subversive organizations.[54] Without a waiver, this provision excludes anarchists, communists, advocates of "world communism" or "totalitarian dictatorship," violent overthrow of government or other stipulated subversive doctrines, or anyone affiliated with subversive organizations. The Amendment directs the Secretary of State to recommend to the Attorney General a waiver of ineligibility unless the Secretary certifies to Congress that admission of the alien would be contrary to the security interests of the United States. Subsequent qualifications of the McGovern

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[50] *See* INA § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A). The legislative history indicates the intent of Congress to admit otherwise ineligible persons "for humane reasons and for reasons of public interest." S. Rep. No. 1137, 82d Cong., 2d Sess. 12 (1952). The three non-waivable provisions exclude aliens engaging in activities "prejudicial to the public interest," spies and saboteurs, and Nazi criminals. 8 U.S.C. § 1182(a)(27), (29), (33).

[51] INA § 212(d)(5), 8 U.S.C. § 1182(d)(5).

[52] For a good summary of this practice, see D. Martin, Major Issues in Immigration Law 11 (1987).

[53] Foreign Relations Authorization Act, Fiscal Year 1978, Pub. L. No. 95-105, § 112, 91 Stat. 848 (1977), 22 U.S.C. § 2691(a) (1982).

[54] INA § 212(a)(28), 8 U.S.C. § 1182(a)(28).

Amendment and a broad interpretation of the "security interests" exception in it have limited its scope somewhat.[55]

II. The Review Process

A. Introduction

Administrative process is dominated by informal and non-reviewed decision-making.[56] It is often difficult to control administrative discretion appropriately. Tight constraints may inhibit bureaucratic creativity, initiative, enthusiasm for the job, and capacity to render justice in the individual case, whereas loose constraints may encourage arbitrariness and inequality.[57]

Like other government employees, consular officers make millions of decisions, involving the taxpayer's dollars, that are generally unconstrained by formal review processes. What makes consular visa denials so distinctive is their impact, in a one-on-one manner, on human lives and aspirations, on freedom of movement, on family reunification, on an individual's economic potential, and quite often, on the lives of American friends, relatives, and prospective employers. What makes visa denials so controversial is that both administrative and judicial review of visa denials by consular officers is very limited. Courts seldom review denials, and administrative review is significantly curtailed by INA § 104(a).[58] That section provides a limited role for the Secretary of State in administering and enforcing the Act and related laws "except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas."[59] An interpretation of this provision that has in effect largely insulated consular denials of visas from administrative and judicial review will be discussed later;[60] suffice it to note here that this provision would at least seem to insulate consular discretion from supervision by the Secretary of State, except as otherwise provided by law.

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[55] *See* Mann, *supra* note 4 at 420-22; Wash. Post, April 15, 1989, at A8, col. 1 (denial of visas to two Heads of State, Fidel Castro and Daniel Ortega, to permit them to speak to the American Society of Newspaper Editors).

[56] K. Davis, Administrative Law Text 88, 91 (3d ed. 1972).

[57] *See* Shumavon & Hibbeln, *Administrative Discretion: Problems and Prospects*, in Administrative Discretion and Public Policy Implementation 1-9 (Shumavon & Hibbeln eds. 1986).

[58] INA § 104(a), 8 U.S.C. § 1104(a).

Well-defined checks on consular discretion seem appropriate. To err is only human. A number of personal factors may influence an officer's exercise of discretion and help explain errors and differences among officers, including rates of visa denial. Other personal factors include tenure of service, personal background, availability of time to make decisions, effect of intermediaries and peer pressure, attitudes toward management and applicants, career objectives, and the promotion system.[61] These factors may either inhibit competence or encourage compliance with policy expectations, help avoid error, and correct error when it occurs, to the extent that the concept of "error" makes sense in the highly discretionary context of the visa process.

If anything, the system encourages consular officers to issue rather than refuse visas in close cases, typically involving nonimmigrant applicants. Since issuances, unlike denials, are rarely reviewed internally by supervising officers, and are therefore subject only to the double-check by the INS at the border or port of entry, issuing visas is relatively risk-free for career-minded consular officers.[62] They do receive reports on aliens to whom they have issued visas and who are later "kicked back" at the border by the

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[59] *Id.* Notice that this *reversed* a requirement of review by the Secretary of State. *See, e.g.*, Public Safety Act of June 20, 1941, *supra* note 14 ("in any case in which a diplomatic or consular officer denies a visa or other travel document under the provisions of this Act, he shall promptly refer the case to the Secretary of State for such further action as the Secretary may deem appropriate.")

[60] *See infra* text accompanying notes 88-89, 95, 103, 124, 145, 156, 159, 234-35, 321-32.

[61] *See* Study, *Consular Discretion in the Immigrant Visa-Issuing Process*, 16 San Diego L. Rev. 87 (1978) [hereinafter cited as Study].

[62] *Id.* at 107, quoting one consular officer as saying, "[t]he nice thing about our job is that if you issue the visa you can't make a mistake. It is only when you refuse that you've made a mistake."

INS, but these cases are relatively uncommon for a single officer. A high level of discretion may thereby tend, overall, to favor applicants.

Despite the apparently large scope of consular discretion, the law provides significant constraints. The values it serves are accountability of consular officers, uniformity or consistency of decisions among the officers and visa sections, and due process for applicants and petitioners. The law attempts to maximize these values at various levels of formality. Substantive rules confine and structure discretion[63] by identifying and attributing relative weight to various factors. The INA, its regulations, and State Department guidelines provide substantive and procedural rules, as do other textual sources, including intra-consulate rules and procedures, policy statements, findings and reasons.

For example, the regulations and interpretative and procedural notes to the regulations confine and structure discretion to determine whether aliens will become "public charges" after entry into the United States. This has been a particularly controversial provision of the law because it requires consular officers to make highly speculative predictions. Documents help guide the determination, however. Thus, although affidavits of support from United States citizens or resident aliens are of questionable utility, a sworn job offer from a prospective, known employer in the United States may help establish eligibility, whereas an applicant's reliance on expected income below the poverty guidelines will almost certainly be a disqualifier. Departmental notes encourage consular officers to elicit and consider such documentation from the applicant as proof of ownership of real estate, stocks and bonds or other property, insurance policies, posted bonds and bank deposits.[64] Although visa sections occasionally establish minimum deposits, the controlling question is not whether the applicant maintains a fixed sum on deposit, but whether, taking account of his or her total estate and income potential, the applicant can avoid becoming a public charge.[65]

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[63] On confining and structuring discretion, see K. Davis, *supra* note 56, at 93-99.

[64] Foreign Affairs Manual, *supra* note 19, at J-78, N3.

A myriad of other provisions and guidelines attempt to confine and structure consular discretion. Information systems, ranging from consular files to the sophisticated Automated Visa Look Out System (AVLOS) and its successors, with information on millions of aliens, assist and constrain consular discretion. Textual guidance is, however, necessarily and often deliberately so open-textured as to invite disagreement on interpretation and construction. A more elaborate process of guidance and review is therefore essential.

It is important to recognize that the process of reviewing consular discretion begins with the initiation of an application, not with the issuance or denial of it. The review process, as broadly defined, by its very existence helps control the initial exercise of discretion insofar as it holds consular officers accountable. Moreover, key actors in the process, who are primarily interested in correcting error after the fact, may also help avoid error by their informal participation or influence before a decision is reached. These actors include supervising officers, the Visa Office in the Department of State, the Secretary of State despite INA § 104(a), the INS, occasionally the Attorney General, legislators, private organizations, attorneys, the media, administrative tribunals (indirectly), and the courts.

An adequate review process should seek to maximize the three values served by legal constraints. These are accountability of consular officers, uniformity or consistency of determinations among officers and visa sections, and due process for applicants and petitioners.

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[65] *Id.*, J-77, N-2.1. For example, the Chief, Visa Section, of one consulate explained that the impression that an applicant

> must have a substantial bank account to qualify for a visa is not correct. The Immigration and Nationality Act states that all persons applying for admission to the United States are presumed to be immigrants until they prove otherwise. Applicants can overcome this presumption by demonstrating economic solvency and strong ties to their home country. One means of demonstrating solvency is with a bank account, but other factors, such as employment and strong family ties here in Mexico are equally important. In general, applicants must be able to show sufficient ties to their home country to insure that they plan to return.

Letter from Celio F. Sandate, Chief, Visa Section, Consulate General of the United States of America, Guadalajara, Mexico, to the author (June 4, 1985).

B. Non-Judicial Aspects

1. Informal, Unofficial Checks

The media and private organizations, as part of an informal mechanism of review, constrain consular discretion. "Visa fixers" and other lay consultants, sometimes representing religious and other non-governmental groups, "do a thriving business and are a continuing source of irritation to consular officers".[66] Fixers are often viewed as unnecessary intermediaries who, for a fee imposed on unsophisticated applicants, waste the time of the officers. They are apt to be most visible in Mexico and other locations near their headquarters or bases of operations in the United States.

Attorneys may also play a significant role in review, particularly in helping to ensure due process, but accessibility can be a significant problem. Neither the INA nor its regulations ensure an applicant's access to counsel during consular adjudication. Thus, each visa section is free to define for itself the limits of attorney representation, including whether the attorney may enter the consular premises, be present during the adjudication, be permitted to speak on behalf of the applicant, be permitted to discuss the case with the Consul, or represent the applicant effectively in requesting reconsideration of a visa denial.[67]

Often, therefore, attorneys have to get their feet in the door of an embassy or consulate and then persuade the Consul to allow them more extended participation in the process. This requires attorneys to devote time and energy to personal letters, telex messages, phone calls and personal visits to establish and maintain an effectiveness in the process of visa issuance. Overcoming the suspicions or even hostility of consular officers may be crucial. Consular policy generally is to reply to all written communications and to return phone calls whenever time permits.

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[66] Study, *supra* note 61, at 150.

[67] Pederson, *supra* note 18, at 297; *supra* text accompanying note 22.

2. Congressional Inquiry

Stateside petitioners and other family members and friends of immigrant and nonimmigrant applicants routinely enlist Congressional inquiries in particular cases. Typically, they elicit prompt, though not necessarily sympathetic, responses[68] prepared by the refusing officer and edited by a reviewing officer. Inquiries signed by Members of Congress, rather than their staff members, are given special attention.[69]

3. Internal Review Procedures

By law, a consular officer who has refused to issue a visa must inform the applicant of the legal basis for the decision.[70] Similarly, after issuing a "quasi-refusal," that is, prior to the filing of a formal application, the consular officer must explain to the potential applicant the legal basis for an advance determination of probable ineligibility.[71] If the ground(s) cannot be overcome by the presentation of additional evidence, the principal consular officer or a designee "shall review the case without delay, record the review decision, and sign and date the prescribed form." If, however, the ground(s) of ineligibility can be overcome by the presentation of additional evidence, the applicant may attempt to do so within stipulated periods of time during which the refusal is deferred.[72] If the officer or designee does not concur in the refusal, he or she may either refer the case to the Visa Office within the State Department for an advisory opinion or reverse the refusal.[73] Reference of a case to the Visa Office is largely a discretionary procedure, usually reserved by the officer for cases where correct interpretation of the law may be uncertain. The principal consular officer or designee will usually confer with the refusing officer before overruling the latter or referring a case to the Visa Office.[74] One formal limitation in the process, however, is the lack of a requirement of notice to the applicant about a referral of his or her papers to the Visa Office, nor any requirement that the applicant be entitled to a hearing by the reviewing officer.

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[68] Study, *supra* note 61, at 109.

[69] Interviews with consular officers, *infra* text in paragraph preceding note 270.

[70] 22 C.F.R. §§ 41.121(b), 42.81(b) (1988). Department procedures are quite specific. The denying officer must take care not to encourage any false expectations. Foreign Affairs Manual, *supra* note 19, at J-849, PN 1.2. The officer must be sensitive, but firm:

> Some officers understandably are, or try to be, very sympathetic, but that too can create problems. If a tone of authority is not evident, the applicant may misunderstand the officer's intentions and believe the visa might still be issued. (In some societies, such a situation might be interpreted as an invitation to a bribe.)
>
> The consular officer should aim for a measured, sympathetic but firm style which will convince the ineligible applicant that the treatment accorded was fair. The consular officer should refer to pertinent statements of the applicant, written or oral, or to a conviction, medical report, false document, previous refusal, or the like, as the basis of the refusal. The officer should then explain the law simply and clearly.

Id., J-849, PN1.1(m).

[71] 22 C.F.R. §§ 41.121(c), 42.81(c) (1988); Foreign Affairs Manual, *supra* note 19, at J-850, PN 2.1.

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[72] 22 C.F.R. §§ 41.121(c), 42.81(c) (1988).

[73] *Id*; See discussion of the Visa Office, *infra* text accompanying notes 78-83, 322-28.

[74] Department of State procedures require this consultation, as follows:

> Although the regulations indicate only two possible actions for a reviewing officer who disagrees with a refusal--submission of the case to the Department or personal assumption of responsibility by reversing the refusal-- the reviewing officer should discuss the case fully with the refusing officer before taking either action. The principles of good management require that the junior officer be involved in any action possible bearing on the junior officer's judgment and performance. Also, in the course of discussion the reviewing officer may become aware of additional facts which the refusing officer did not make clear in the refusal worksheet. Most important, the junior officer will learn more about the visa function and the application of some of the more complicated laws and regulations in visa work. Ideally, any differences will be worked out in the discussion and the refusing officer, not the reviewing officer, will take whatever action is necessary. Only if there is no resolution should the reviewing officer take the actions specified in 22 CFR 42.81(c), and then only after the refusing officer has been informed what the action will be and why.

Foreign Affairs Manual, *supra* note 19, at J-849-50, PN 1.3.

In the case of an immigrant visa, the applicant has yet another opportunity for review. If, within one year of a refusal, an applicant "adduces further evidence tending to overcome the ground of ineligibility on which the refusal was based, the case shall be reconsidered".[75]

Although the integrity of this review process is open to question and cannot work, of course, in a one-person visa section, the possibility of reversal by a supervising officer, who may also have promotion and other personnel authority, helps confine and structure consular discretion. "A number of consular posts have demonstrated a commitment to provide meaningful review,"[76] particularly at larger posts, principally by permitting applicants or their attorneys to present additional evidence at each stage of a visa proceeding. Typically, applicants know that they can return repeatedly to present additional evidence. It is estimated that they are eventually successful in almost fifty percent of all immigrant cases after initial refusal and in sixty percent of all cases after refusal for insufficient documentation.[77]

4. Review By the Visa Office

A principal consular officer or alternate, but not a denied applicant, may refer a case to the Visa Office in the Bureau of Consular Affairs of the State Department, or the Department itself may request a consular officer in a specific case or class of cases to submit a report on a visa refusal or refusals.[78] The Visa Office has jurisdiction to consider only substantive, not procedural issues. If the consular officer involved disagrees with the opinion, he or she may resubmit the case to the office with an explanation of the proposed action. In some cases, review by the Visa Office is required by law. These include refusals on the ground of a sham marriage, drug trafficking, fraud or willful misrepresentation in procuring a visa or entry into the United States (under the "rule of probability") and commission of a political crime.[79]

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[75] 22 C.F.R. § 42.81(e) (1988).

[76] Pederson, *supra* note 18, at 314.

[77] Study, *supra* note 61, at 109; 105, n. 103 and text accompanying n. 104.

[78] 22 C.F.R. §§ 41.121(d), 42.81(d) (1988).

The first step in review by the Visa Office is to consult with the Consul in charge of the pertinent visa section. The particular visa applicant, who is not consulted, may not even know that the Visa Office is reviewing the case. After the Visa Office has completed its review, it issues an Advisory Opinion. This opinion is binding on all interpretations of law,[80] but is advisory only on factual issues.

Consular officers generally comply with Advisory Opinions on matters of law,[81] but they may question an Opinion. If so, they must resubmit the case to the Department with an explanation of any proposed action that is contrary to the Opinion. Practitioners regard this process of review as fair and honest but time-consuming,[82] while many consular officers regard review by the Visa Office as either a nuisance or a means of delaying a case.[83] Advisory opinions are potentially very useful, but only marginally significant in practice today.

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[79] Remarks by H. Edward Odom, Federal Bar Association, 9th Annual Immigration Seminar (May 19, 1988) [hereinafter cited as Federal Bar Association Seminar].

[80] 22 C.F.R. §§ 41.121(d), 42.81(d) (1988).

[81] Study, *supra* note 61, at 111.

[82] Remarks by Jan Pederson, Federal Bar Association Seminar, *supra* note 79. There are, of course, differences of opinions among practioners on the process. The confidentiality of the process is particularly controversial.

[83]

> I always used the referral system for tactical reasons when I wanted to delay a stinking case, but never when I really wanted an informed opinion. The bureaucracy is too slow and also is too removed from the scene.

Letter from Charles Stuart Kennedy, Director, Foreign Affairs Oral History Program, Georgetown University, to the author (Feb. 18, 1989).

5. Administrative Appeals

Taking account of these procedures, it is no longer correct to conclude that "[t]he limited administrative review [of visa denials] currently available provides no independent check on consular officers"[84] or that the latter are "free from the control of a superior reviewing body."[85] The review process discussed thus far is routine and fairly well structured, helping to check errors after the fact, as Part IV indicates, and avoiding them in the first place by virtue of its very existence.

Internal administrative review and Visa Office review may be seen to function in a manner that approximates more formal processes of administrative review. The bias inherent in the physical proximity of consular officers to their reviewing superiors can be exaggerated by skeptics of the internal review process. For example, until 1983 special inquiry officers (or "immigration judges," as they have come to be known) were co-employees of the same unit of the Department of Justice, the INS, as that of the officers whose decisions they reviewed. To be sure, functional comparison between consular and INS review processes may be somewhat misleading. Although the review process discussed thus far plays an important role, it is certainly not the equivalent of an INS review board. It lacks many of the formalities of bilateral due process and it is ad hoc. Practices among consulates vary substantially. Thus, two aliens with identical problems of eligibility for a visa but applying in different consular districts may receive dissimilar treatment. Although a lack of uniformity may be a problem even in more formal processes of administrative review, it is particularly characteristic of the intra-consular review process. Most importantly, although some immigration decisions by INS officers are not appealable administratively, most are appealable,[86] whereas there is no formal, extra-consular means for administrative review of visa denials.

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[84] *Developments in the Law--Immigration Policy and the Rights of Aliens*, 96 Harv. L. Rev. 1286, 1360 (1983) [hereinafter cited as Developments].

[85] Hearings Before the President's Commission on Immigration and Naturalization, House Comm. on the Judiciary, 82d Cong. 2d Sess. 1575, 1578 (1952).

The immunity of consular discretion from administrative review is unusual within the federal government, to say the least.[87] The legal basis for this deviation from the normal practice of formal administrative review is a construction of INA § 104(a), which precludes the Secretary of State from the administration or enforcement of "those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas." The exact legislative intent behind this language is somewhat unclear. It may be that Congress wished to protect the Secretary of State from complaints from foreign officials unable to obtain visas. INA § 104(a) enables the Secretary to disclaim responsibility for a politically delicate exclusion by pointing out that he has no power to review the denial. That legislative purpose is, however, only speculative. More likely, Congress was concerned about the threat that the courts would be deluged, given the number of prospective petitioners for review. Finally, there is some indication that the quoted language in INA § 104(a) was intended, not to immunize visa determinations from review, but rather to confirm by implication the power of the Attorney General, rather than the Secretary of State, to undertake the review.[88] When the INA was enacted in 1952, Congress voted to reject an amendment to this provision that would have provided, nevertheless, for an administrative board to hear appeals of visa denials. The amendment failed, but a House committee report emphasized that the Secretary of State would have

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[86] T. A. Aleinikoff & D. Martin, *supra* note 2, at 92. *See* Appendix D for a series of diagrams that depict avenues of administrative and judicial review under the immigration laws. Martin, *supra* note 52, at 104-05.

[87] It is, of course, not unusual in other legal systems, but British law, by contrast, provides for both administrative appeal and judicial review of visa denials. *See* S. Legomsky, *infra* note 125, at 145, n. 16; United Kingdom Immigrants Advisory Service, Annual Report 1987-88, at 2, 19 (1989) [hereinafter cited as UKIAS Report].

[88] *See* Senate Jud. Comm., Revision of Immigration and Nationality Laws, S. Rep. No. 1137, 82d Cong., 2nd Sess. 7 (1952). On the overall intent of Congress to limit reviewability to avoid administrative and judicial burdens, *see* Senate Jud. Comm., The Immigration and Naturalization Systems of the United States, S. Rep. No. 1515, 81st Cong., 2nd Sess. 622 (1950).

"ample authority to provide...for a system of cooperation between consular officers stationed abroad and the Department, so as to be able to advise and assist such officers in reaching their decision [sic] in more complex individual cases pending before them."[89]

C. Judicial Review

1. General Considerations

Courts regularly take jurisdiction to consider a wide range of immigration issues,[90] and the trend is in that direction.[91] Courts are specifically empowered to undertake habeas corpus proceedings as the "sole and exclusive remedy" for appeal of orders excluding aliens upon their arrival at the border or other port of entry of the United States.[92] The theory is that a habeas corpus issue may exist and due process applies once a person has arrived at the border, and is at least subject to being taken into custody in United States territory, even if he or she is later released on bond, is paroled, or is subject to a deportation order.[93] The formal process involves administrative review by a special inquiry officer (immigration judge), with a right of appeal. Courts have taken jurisdiction notwithstanding INA provisions that exclusion and deportation proceedings shall be "final."[94]

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[89] H.R. Rep. No. 1365, 82d Cong., 2d. Sess. (1952), *reprinted in* 1952 U.S. Code Cong. & Admin. News 1653, 1688.

[90] In addition to adjudication concerning deportation orders and INS orders of exclusion,

> review proceedings can be brought to question such matters as the following: denials of visa petitions, registry, benefits under the agricultural workers program, waivers for exchange visitors, denial of parole to crewmen, and adjustment of status, denial of approval for a school qualified to accept nonimmigrant students, or withdrawal of such approval, change from one nonimmigrant status to another, denial of a labor certification, improper seizure or retention of the alien's passport, denial of extension of temporary stay, of asylum claim, claim of arbitrary, discriminatory, and unconstitutional action in bringing deportation proceeding when prosecutive discretion usually exercised to withhold deportation proceedings in similar cases, exclusion from a list of companies authorized to conduct immigration medical examinations, and breach of immigration bond.

C. Gordon & E. Gordon, *supra* note 39, at 8-40.

[91] With limited exceptions, practically all final administrative determinations under the immigration and nationality laws are now subject to review in the courts. This was not always so. In the early days of federal immigration law enforcement, the courts maintained a reserved attitude, regarding immigration as a subject which the Constitution had committed largely to the legislative judgment of Congress. The attitudes of both Congress and the courts have changed over the last few decades and both are now more hospitable to judicial review in this field. In each of the last few years, literally hundreds of reported decisions on immigration and nationality issues have been handed down by the federal courts.

Judicial reviewability of consular (as opposed to INS) discretion, however, has been very limited. Controversy about reviewing visa denials centers on an inference of judicial nonreviewability drawn from INA § 104(a) and an inconsistency between provisions of the Administrative Procedure Act (APA)[95] and scattered, but important judicial decisions that limit reviewability.[96] Thus, if an applicant is refused a visa, his or her rights of judicial review are extremely restricted.

Roberts, *Judicial Review of Immigration Issues: Analysis and Forecast*, in II Immigration and Nationality Law, 41st Anniversary Symposium of the American Immigration Lawyers Association 441, 441 (1987).

[92] INA §§ 106(a)(9), 106(b), 8 U.S.C. §§ 1105(a)(9), 1105(b). Judicial review of final exclusion orders requires exhaustion of administrative remedies. INA § 106(c), 8 U.S.C. § 1105a(c).

[93] 28 U.S.C. 2241(c) (1982), INA § 106(b), 8 U.S.C. 1105a(b). *But see* the requirement under the Visa Waiver Pilot Program for Certain Visitors, INA, *supra* note 13, at § 217, that eligible aliens must waive "any right to review or appeal . . . of an immigration officer's determination as to the admissibility of the alien at the port of entry into the United States." *Id.* at (b)(4)(A).

[94] *See* Brownell v. Tom We Shung, 352 U.S. 180, 185 (1956); Estep v. United States, 327 U.S. 114, 125 (1946).

[95] Ch. 324, 60 Stat. 237 (1946), *repealed and replaced by* Government Organization and Employees Act, Pub. L. No. 89-554, §§ 551-59, 701-06, 80 Stat. 378 (1966), 5 U.S.C. §§ 551-59, 701-06 (1982 & Supp. IV 1986)[hereinafter cited as APA].

[96] *See infra* text accompanying notes 120-149.

2. Requirements of the Administrative Procedure Act

Section 701(a) of the APA codifies a common law presumption that the actions of governmental agencies are subject to judicial review. *Rusk v. Cort*[97] established the APA's applicability to State Department decisions, and *Brownell v. Tom We Shung*[98], specifically to exclusion orders of the INS or Attorney General. In 1961 Congress expressly confirmed the latter presumption of review under then APA § 10(a) by providing in INA § 106 for review in federal district court of exclusion orders "by habeas corpus proceedings and not otherwise."[99] This provision applies only to INS exclusions after an alien presents himself at the border, so that consular discretion to deny visas before that event remains outside the express scope of INA § 106.

Under the APA there are only two exceptions to the reviewability of agency action, namely, when "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."[100] In order to confirm or deny judicial reviewability of visa denials, it is necessary to examine each of these two exceptions.

With reference to the first exception -- when "statutes preclude judicial review" -- the INA simply does not do so. Nor does any other federal legislation. Nonreviewability or limited reviewability is court-made law. It is a judicial construct, a legal fiction. During Congressional consideration of the INA, the record of debate discloses only one objection to judicial review,[101] as opposed to several objections to consular nonreviewability. During related consideration of a provision on deportation orders, both of the co-sponsors of the INA attempted to assure their colleagues that the APA applied. Although Senator

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[97] 369 U.S. 367 (1962).

[98] 352 U.S. 180 (1956).

[99] Pub. L. No. 87-301, 75 Stat. 683 (1961) (codified as 8 U.S.C. § 1105(b)).

[100] 5 U.S.C. § 701 (1982).

[101] 98 Cong. Rec. 4431 (1952) (Statement of Rep. Graham).

McCarran opposed a specific appellate mechanism that was eventually adopted for reviewing cases other than visa denials, he did not oppose the right of appeal itself.[102]

One might infer, however, that the lack of any express intent in the INA to apply the APA to visa denials implied an intent to insulate them from the APA. One might also infer that the insulation of visa denials from external administrative review under INA § 104 implies insulation from judicial review as well. These inferences, however, do not square with the express intent of APA § 701(a), that judicial review will be presumed, as a matter of the common law, except when a statute precludes review. Section 559 provides even more precisely that a "[s]ubsequent statute may not be held to supersede or modify [the Act] except to the extent that it does so expressly."[103] The INA, as "subsequent legislation", therefore cannot be properly interpreted to establish nonreviewability by implication.

In *Abbott Laboratories v. Gardner*,[104] the Supreme Court, without qualification, confirmed that the APA *presumes* judicial review unless Congress otherwise precludes it. "Exceptions from the . . . Administrative Procedure Act are not lightly to be presumed."[105] Review is precluded only if there is *clear and convincing evidence* that an Act of Congress specifically prohibits it rather than simply failing to authorize it, or by implication has clearly intended to prohibit review.[106] Congress *could have* created an exception to the APA, but never did so.

A somewhat stronger version of the nonreviewability-by-implication argument is that the dead hand of the pre-APA, common-law past was intended to impose an exception to APA § 701(a). Accordingly judicial nonreviewability of consular discretion to deny visas is a special exception to the APA, despite §§ 559 and 701(a) because the courts had established a common law rule of nonreviewability prior to the enactment of the APA. Therefore, one might infer that the rule was a common law exception to the more general common law presumption of review that was later incorporated into the APA.[107] Aside from the questionability of this construction under a literal reading of APA §§ 559 and 701(a), as discussed above, Congress restated the prevailing rule requiring review without noting or incorporating the purported exception. The only intended qualifications are the exemptions which Congress specifically provided in the statute. Congress therefore appears to have resisted the dead hand of nonreviewability.

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[102] 98 Cong. Rec. 4416, 5625-26, 5778-79 (1952).

[103] 5 U.S.C. § 559.

[104] 387 U.S. 136 (1967).

[105] Marcello v. Bonds, 349 U.S. 302, 310 (1955), *quoted in* Brownell v. Tom We Shung, 352 U.S. 180, 185 (1956).

[106] Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 n. 4 (1986); Rusk v. Cort, 369 U.S. 367, 380 (1962); Heikkila v. Barber, 345 U.S. 229, 237 (1953).

Also, in *Abourezk v. Reagan*,[108] which addressed a challenge to a visa refusal on ideological grounds under the INA, a federal appeals court emphasized its duty to focus on questions of statutory construction so as to avoid constitutional construction if at all possible. In applying the "cardinal principle" of *Ashwander v. TVA*,[109] the court acknowledged a judicial duty to try to inquire "whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided."[110] Thus, a simple construction of the APA avoids posing the constitutional issue presented by an aberrant line of common law. It would seem, therefore, that the dead hand of the pre-APA common law past ought to be ignored.

Nevertheless, APA § 701(a) was amended in 1976 to include language that might seem to restore the dead hand of non-reviewability. The amended language provides that "[n]othing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground."[111] The term "other limitations on judicial review" might be read to confirm the common law exception. The amendment, however, was not intended to have this effect. Instead, it is part of a larger revision of the APA to remove governmental immunity as a bar to judicial review. It was "not intended to affect or change defenses other than sovereign immunity".[112] The language quoted above therefore serves only to confirm common restrictions on judicial review, such as dismissal for lack of standing, failure to state a cause of action, or failure to exhaust administrative remedies.[113] The new language therefore does not close the door on judicial review; quite the contrary, the full amendment was intended to ensure greater accountability by opening the courts further to actions against the government.

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[107] *See, e.g.*, Pena v. Kissinger, 409 F. Supp. 1182 (S.D. N.Y. 1976).

[108] 785 F.2d 1043 (D.C. Cir. 1986), *aff'd per curiam*, 108 S.Ct. 252 (1987). For subsequent history, *see* City of New York v. Baker, 878 F.2d 507 (D.C. Cir. 1989).

[109] 297 U.S. 288 (1936).

[110] 785 F.2d at 1052 (quoting 297 U.S. at 348).

The second statutory exception to the common law presumption of review under APA § 701(a)--action "committed to agency discretion--" was further elaborated in *Citizens to Preserve Overton Park, Inc. v. Volpe,*[114] which limited the exception to situations where "there is no law to apply,"[115] either by pre-APA practice or an absence of legislative action. Thus, the courts have consistently construed both exceptions under APA § 701(a) very narrowly. *Heckler v. Chaney*[116] added that the APA intended to preclude judicial review under the second exception of § 701(a) where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."[117] Here, however, the INA provides specific enough standards, together with customary international law and a long trail of jurisprudence, leaving no doubt about the existence of meaningful standards.

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[111] Act of Oct. 21, 1976, Pub. L. No. 94-574, § 702, 90 Stat. 2721, 5 U.S.C. § 702 (Supp. IV 1986).

[112] H. R. Rep. No. 1656, 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6121, 6132.

[113] *Id.*; *see also* C. Koch, 2 Administrative Law and Practice 217 (1985).

[114] 401 U.S. 402 (1971).

[115] *Id.* at 410

[116] 470 U.S. 821 (1985).

[117] *Id.* at 830.

Just as there is no rule without a remedy, so there is no review without a plaintiff. The APA provides for standing, too. In *Association of Data Processing Service Organizations v. Camp*,[118] the Supreme Court confirmed that APA § 702 authorizes suit to a person who suffers a "legal wrong because of agency action or [who is] adversely affected or aggrieved by agency action within the meaning of a relevant statute."[119] In sum, although the INA does not confer a right of action to challenge a visa denial, the APA, more importantly, does.

3. Case Law to the Contrary

No federal statute has ever explicitly precluded judicial review of consular determinations. They are therefore subject to the APA's provisions for judicial review. There is, however, a puzzling line of cases that suggests the contrary.

Two appellate opinions of the 1920's, long before enactment of the APA, ushered in the notion that visa-denying discretion of consular officers is judicially nonreviewable. *United States ex rel. London v. Phelps* rather cryptically observed in dicta that the court lacked "jurisdiction"[120] to review the denial of a visa, without explaining what was meant by that term--a "gratuitous afterthought"[121] in one commentator's words. *United States ex rel. Ulrich v. Kellogg*[122] presumed non-reviewability in the absence of any affirmative provisions in the 1924 Immigration Act[123] for "official review." This negative pregnant also contributed later to the interpretation of INA § 104(a) that implies judicial non-reviewability from a confirmation of consular authority. Thus, in the absence of any express stipulation of judicial authority,[124] INA § 104(a) has been interpreted to preclude judicial review even though, at most, it suggests *administrative*, rather than judicial, nonreviewability. None of these three bases for nonreviewability--lack of "jurisdiction", preclusively broad consular discretion, nor the absence of an affirmative authorization of judicial review would seem to have survived the APA.[125]

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[118] 397 U.S. 150 (1970).

[119] 5 U.S.C. §702.

[120] 22 F.2d 288, 290 (2d Cir.1927), *cert. denied*, 276 U.S. 630 (1928).

[121] Note, *Judicial Review of Visa Denials: Reexamining Consular Nonreviewability*, 52 N.Y.U. L. Rev. 1137, 1143-44 (1977).

[122] 30 F.2d 984 (D.C. Cir. 1929), *cert. denied*, 279 U.S. 868 (1929).

[123] Immigration Act of 1924, ch. 190, 43 Stat. 153, 8 U.S.C. § 203 (1946 & Supp. III 1950) (repealed 1952).

The timidity of the judicial system in these two cases is explained by a "plenary power" doctrine that the Court fashioned. This doctrine has been applied to require judicial deference to Congress or to Executive action under Congressional authority. In the Court's 1895 pronouncement of the doctrine:

> the power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.[126]

The Court reaffirmed this plenary power of Congress in 1909 when it wrote that "over no conceivable subject is the legislative power of Congress more complete than it is [over the admission of aliens]."[127]

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[124] American Bar Association, Section of Litigation, & the American Immigration Lawyers Association, Report in Support of a Recommendation Regarding Amendments to Legislation and Regulations Establishing a System for Review of Visa Denials (1988).

[125] *See* S. Legomsky, Immigration and the Judiciary: Law and Politics in Britain and America 146-49 (1987).

[126] Kleindienst v. Mandel, 408 U.S. 753, 766 (quoting Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895)).

[127] Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909).

The apotheosis of Congress and the genuflection of the courts continued. Later judicial decisions made clear that the powers of Congress, inherent in sovereignty, were so "plenary" as to void ordinary constitutional protection, that is, to leave to Congress alone the responsibility of defining and implementing First Amendment, due process and other rights affecting the "privileges" of aliens. *United States ex rel. Knauff v. Shaughnessy*[128] and *Shaughnessy v. United States ex rel. Mezei*[129] established that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned...it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government."[130] The remarkable result in *Mezei* was to deny reentry to an alien after a two-year visit abroad, even though he had resided in the United States for 25 years.

In *Galvan v. Press*,[131] a deportation case, Justice Frankfurter indicated his misgivings about the Court's refusal to place Constitutional limitations on the plenary power of Congress to control immigration. "But," he wrote, "the slate is not clean... Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government... We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors."[132] The full slate to which he referred included two lines of authority. First, the "yellow peril" cases of the late nineteenth and early twentieth century[133] upheld the right of Congress to exclude entire nationalities for essentially racist reasons. Second, the somewhat mystical concept of a sovereign's inherent powers, as transmogrified into a separation-of-powers doctrine of constitutional law, has deterred many courts from reviewing the constitutionality of decisions by either of the political branches of the federal government.[134] These lines of authority help explain the inclination of the courts to view visa denials, or many at least, as nonreviewable despite the apparent policy of Congress to render them judicially reviewable, like any other administrative decisions within the scope of the APA.

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[128] 338 U.S. 537 (1950).

[129] 345 U.S. 206 (1953).

[130] 338 U.S. at 544, 543, respectively.

[131] 347 U.S. 522 (1954).

[132] *Id.* at 531.

[133] *See* Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 Harv. L. Rev. 853 (1987).

In *Kleindienst v. Mandel*,[135] the Supreme Court indicated a limited role for the courts in reviewing visa denials. There, several Americans and a Belgian Marxist, Mandel, challenged the Attorney General's refusal to waive denial of a visa to Mr. Mandel that had been based on INA §§212(a)(28)(D) and (G) (v) (advocating or teaching communism).[136] The American plaintiffs claimed that the Attorney General's action violated their First Amendment rights to hear lectures by Mr. Mandel in the United States. The Court, deciding in favor of the government, held that refusal to waive a visa denial was nonreviewable *if*, as here, the government had acted "on the basis of a facially legitimate and bona fide reason."[137] In *Mandel* the reason given was the applicant's abuse of visa privileges during previous trips to the United States.

Mandel is, unfortunately, quite ambiguous. To be sure, the *Mandel* test seems clear: When the Executive's reasons for a waiver denial are "facially legitimate and bona fide...the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."[138] In context, however, it is unclear whether the Court considered this case to be reviewable only because it involved a First Amendment issue, that is, an issue involving specially protected constitutional guarantees. It is also unclear whether reviewability is available after *Mandel* in all cases involving the exercise of executive discretion, or just those involving waiver denials. Finally, it is unclear whether the American plaintiffs had standing to bring the action whereas a non-resident alien by himself would not have had standing. The Court created two new issues: what was meant by the new standard--"that was remarkably deferential to the administrators"--[139] and whether an absence of any consular justification for a visa denial could withstand judicial attack.

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[134] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[135] 408 U.S. 753 (1972); *accord*, Centeno v. Shultz, 817 F.2d 1212 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 696 (1988).

[136] 8 U.S.C. §1182(a)(28) (D) and (G)(v).

[137] 408 U.S. at 770.

The decision has aroused considerable commentary, some of which has misinterpreted it to confirm the notion of judicial nonreviewability even though it clearly upheld the right to review some circumstances. Because the decision is rather fuzzy around the edges, it leaves more questions than it resolves about the extent to which visa denials are reviewable.

Mandel is, however, clear in its reiteration of the "plenary power" of Congress to control immigration, even to the extent of largely immunizing executive decisions from judicial scrutiny. The plenary power doctrine has gone through five historical stages:[140] (1) federal law preempts state laws excluding aliens; (2) federal exclusion statutes are justified under the Commerce Clause and (3) as a power inherent in sovereignty; (4) (shifting from issues involving an allocation of power within the federal system to the judicial role in vindicating civil rights and liberties), judicial inquiry is barred in such cases; and (5) ("the snowballing phase"), judicial inquiry is barred because the slate is not clean, so that the Court is helpless to vindicate individual rights in the face of the plenary power doctrine.

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[138] *Id.* Fundamental rights, such as those under the First Amendment, seem to provide a particularly strong rationale for judicial reviewability. Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985), *aff'd*, 845 F.2d 1111 (1st Cir. 1988).

[139] Martin, *supra* note 52, at 108.

[140] S. Legomsky, *supra* note 125, at 179-211, 217-19.

Where does that leave the law today? *Mandel* has two arms. On the one hand, the opinion contributed to the snowballing effect of the plenary power doctrine in encouraging judicial abstention. Without much elaboration, and with the greatest of ease, several lower court decisions have therefore precluded review of consular discretion.[141] Two cases merit comment because they were at least based on statutory interpretation rather than a mindless deference to the unexpressed "will" of Congress. *Loza-Bedoya v. INS*[142] relies on INA §221(a),[143] which, however, merely establishes the routine authority of consular officers to issue visas, without precluding review. *Licea-Gomez v. Pilliod*,[144] relies on INA §104(a),[145] the controversial provision that explicitly precludes review by the Secretary of State. That provision does not, however, refer at all to the courts.

On the other hand, *Mandel*'s "facially legitimate and bona fide reason" test has encouraged limited reviewability, at least. The plenary power doctrine may be thus going through a sixth, reversing stage[146] that is beginning to stall the movement of the snowball, or even melt it.

In *Fiallo v. Bell*[147] the Court considered the constitutionality of INA definitions of "child" and "parent"[148] that had the effect of preventing unwed fathers of citizens and illegitimate children of male citizens from relying on the blood connection in order to obtain immigrant visas. In view of two discriminatory distinctions -- gender and legitimacy -- the Court assumed its "limited judicial responsibility"[149] to review the case. The quoted language, ungenerous as it might seem, is nevertheless significant as a gloss on the incantation in the same opinion of the *Stranahan* dictum ("over no conceivable subject is the legislative power of Congress more complete than it is [over the admission of aliens]").[150]

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[141] City of New York v. Baker, 878 F.2d 507 (D.C. Cir. 1989); Centeno v. Shultz, 817 F.2d 1212 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 696 (1988); Li Hing of Hong Kong, Inc.v. Levin, 800 F.2d 970 (9th Cir. 1986); Ventura-Escamilla v. INS, 647 F.2d 28, 30 (9th Cir. 1981); Rivera de Gomez v. Kissinger, 534 F.2d 518 (2d Cir 1976), *cert denied*, 429 U.S. 897 (1976); Burrafato v.United States, 523 F.2d 554 (2d Cir. 1975), *cert. denied*, 424 U.S. 910 (1976); Pena v. Kissinger, 409 F. Supp. 1182 (S.D.N.Y. 1976); Hermina-Sague v. United States, 416 F. Supp. 217 (D.P.R. 1976).

[142] 410 F.2d 343 (9th Cir. 1969).

[143] INA §221(a), 8 U.S.C. §1201(a).

[144] 193 F. Supp. 577 (N.D. Ill. 1960).

[145] INA §104(a), 8 U.S.C. §1104(a).

[146] *See* S. Legomsky, *supra* note 125, at 211-17.

[147] 430 U.S. 787 (1977).

[148] INA §101(b)(1)-(2), 8 U.S.C. § 1101(b)(1)-(2).

Fiallo's recognition of a "limited judicial responsibility", despite its clear deference to congressional policy, has been read to allow review of the constitutionality of the INA provisions upon which particular visa denials at issue were based[151] and the validity of Departmental regulations structuring and confining the visa process.[152] None of these cases, however, directly addressed the issue of the reviewability of consular discretion.

Several other recent cases suggest a trend toward a more direct, though still limited review of visa denials under the APA, particularly where First Amendment or other fundamental rights are implicated.[153] Perhaps the snowball of the plenary power doctrine is melting somewhat. The question no longer seems to be whether courts may review visa denial issues, but to what extent they may properly do so.

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[149] 430 U.S. at 793, n.5.

[150] Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909).

[151] *See, e.g.*, Martinez v. Bell, 468 F. Supp. 719 (S.D.N.Y. 1979).

[152] *See, e.g.*, Mulligan v. Schultz [sic], 848 F.2d 655 (5th Cir. 1988); Friedberger v. Schultz [sic], 616 F. Supp. 1315 (E.D. Pa.1985).

[153] Abourezk v. Reagan, 785 F.2d 1043, 1050-51 (D.C. Cir. 1986), *aff'd per curiam*, 108 S.Ct. 252 (1987) (APA authorizes suit by "aggrieved" groups and individuals who suffer "injury in fact" by reason of being denied the opportunity to hear a foreign speaker who has been refused a visa) (for subsequent history of this case, *see* City of New York v. Baker, 878 F.2d 507 (D.C. Cir. 1989); Harvard Law School Forum v. Shultz, 633 F. Supp. 525, 528 (D.Mass 1986) *vacated without published opinion*, 852 F.2d 563 (Table) (1st Cir. 1986); (issue of visa denial to official of the Palestinian Liberation Organization is justiciable and plaintiffs are entitled to a preliminary injunction "to enjoin the Secretary of State from prohibiting [the PLO official] from participating in [a scheduled] debate "in the United States), Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985), *aff'd*, 845 F.2d 1111 (1st Cir. 1988) (non-resident alien herself has "symbolic" standing and residents have actual standing to complain on First Amendment grounds against refusal of visa to the alien, a prospective speaker).

How far does *Mandel*'s standard of a "facially legitimate and bona fide reason" extend? What are the present contours of judicial reviewability? At the very least, the Supreme Court has indicated that the government must demonstrate a "facially legitimate and bona fide reason" for refusing to waive a visa denial, whenever a United States citizen brings action for injury to fundamental, constitutionally protected rights resulting from the government's refusal to issue a visa to a foreign applicant. Beyond that, the trail to the courthouse seems tortuous. In practice, the *Mandel* standard offers an uncertain measure of constitutional protection. Some courts appear to have accepted "almost any reason the government offers,"[154] so long as it is not patently absurd, while other courts have scrutinized visa denials more carefully.[155] Part III provides further guidance along the trail to formal review.

III. Arguments Against Review: An Analysis

Visa denials by consular officers are reviewable and, in fact, are regularly reviewed according to the managerial and limited appellate procedures that have just been summarized. It is obvious, however, that more formal and definitive procedures for reviewing visa denials are severely limited. Administrative appeal, ordinarily routine in other spheres of administrative law, is limited primarily by INA § 104(a),[156] and adjudication is limited primarily by an inference drawn from § 104(a) and the plenary power doctrine. The case law does not inspire confidence that a "limited judicial responsibility" alone will serve the process very readily. Justice Frankfurter's observation that the slate is not clean offers a good description of the past and present, but a poor prescription for the future.

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[154] Note, *First Amendment Limitations on the Exclusion of Aliens*, 62 N.Y.U.L. Rev. 149, 163-64 (1987).

[155] *See* cases cited *supra* note 153.

[156] 8 U.S.C. § 1104(a).

What is the margin for expanded reviewability within the present framework? Is the law apt to develop substantially on the basis of indirect challenges to consular discretion and the consideration of "facially legitimate and bona fide reason(s)" for visa denials? What if the slate were cleaned up? Why has Congress not mandated review? To help answer these questions, Part III and the first portion of Part V focus on the principles and policies that have been invoked to limit reviewability and to explain the apparent reluctance of Congress to provide explicitly for review. It is essential to take account of constitutional, international, legal, and practical dimensions of reviewability in order to define a realistic set of alternatives to guide legal development.

Although INA § 104(a) has been interpreted to be sufficient by itself to proscribe most administrative review outside visa sections of embassies and consulates, issues of judicial reviewability would also surround administrative review in the absence of § 104(a). Thus, if the INA were amended to provide for administrative appeals outside visa sections, the following discussion would be doubly relevant.

A. Rationales for Limiting Reviewability

The two decisions during the 1920's that first struggled to articulate limitations of reviewability appear, in tandem, to have been based on three reasons--the court's lack of "jurisdiction," preclusively broad authorization by Congress of consular discretion, and the absence of affirmative authorization of judicial review.[157] Although these reasons have not been controlling in later cases, they have been influential. Each merits brief consideration.

1. Lack of Jurisdiction

Although the APA does not provide an independent basis of adjudicative jurisdiction, INA § 279[158] provides for federal district court jurisdiction over all civil and criminal causes of action arising under "Title II-Immigration" of the Act, which includes the provisions for issuing and denying visas.[159] INA § 104(a) should be considered irrelevant. In practice, the provision does not even seem to constrain the Department of State, through the Visa Office, from reviewing consular decisions for errors of law, nor from rendering binding opinions on points of law. If INA § 104 explicitly immunizes consular discretion to deny visas from the administrative supervision of the Secretary of State and yet the Visa Office does in fact supervise those decisions, if only to a limited extent, it is very difficult to argue that the provision can be used to preclude review by the courts, which is not even mentioned in the section. Furthermore, the requirement that officers have "reason to believe"[160] in the ineligibility of applicants, in order to deny them visas, is premised by Department regulations on a "reasonable person" standard[161] that actually invites judicial interpretation. Also, INA § 103(a)[162] establishes that a "determination and ruling by the Attorney General with respect to all questions of law shall be controlling" in the "administration and enforcement" of the Act. The implication is that, notwithstanding the discretion given to consular officers under INA § 104 vis-a-vis the Secretary of State, the Attorney General may retain review competence. Finally, the courts ordinarily have general competence over federal questions under 28 U.S.C. § 1331.

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[157] United States ex rel. London v. Phelps, 22 F.2d 288 (2d Cir. 1927), *cert. denied*, 276 U.S. 630 (1928); United States ex rel. Ulrich v. Kellogg, 30 F.2d 984 (D.C. Cir. 1929), *cert. denied*, 279 U.S. 868 (1929). *See supra* text accompanying notes 120-25.

[158] 8 U.S.C. § 1329.

2. Preclusively Broad Discretion of Consular Officers

The INA itself confines and structures consular discretion by its qualitative and quantitative provisions for issuing visas, and a Department regulation provides that "[a] visa can be refused only upon a ground specifically set out in law or implementing regulations."[163] Legal language such as this and the reasonable person standard would have little or no meaning if applications of them were not subject to judicial review. Most importantly, the APA's insulation from judicial review of action committed to agency discretion "requires either a statutory intent to withhold review or a judicial determination that review would be impractical or improper."[164] There has been no such express intent. Whether review would be "impractical or improper" is a more difficult question that will be discussed later.

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[159] Within Title II, 8 U.S.C. § 221(g), for example, provides criteria for consular discretion to deny a visa. *See also* S. Legomsky, *supra* note 125, at 147, n. 31.

[160] INA § 221(g)(3), 8 U.S.C. § 1201(g)(3).

[161] 22 C.F.R. § 40.6 (1988).

[162] 8 U.S.C. § 1103(a).

3. Absence of Affirmative Authorization of Judicial Review

The APA, enacted after the two cases, *presumes* jurisdiction, subject to "clear and convincing evidence"[165] of Congressional intent to preclude it. The only possible evidence might be the acquiescence of Congress in judicial determinations of its nonauthorization of review, but this is insufficient to circumvent the explicit authority of the APA.

This rationale survived the APA and influenced the interpretation of the INA that has inhibited judicial reviewability of visa denials. Accordingly, it is argued that because INA § 104(a) precludes direct supervision of visa denials by the Secretary of State and because the same section does not otherwise grant supervisory authority, the courts are not authorized to review visa denials.

B. Plenary Powers Revisited

The plenary power doctrine, largely replacing earlier rationales, establishes that governmental interests, not the genus of a right, determine the standard of (very limited) review over visa denials by consular officers.[166] It has always been controversial. "This doctrine," wrote Justice Brewer in one of the formative cases,

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[163] 22 C.F.R. § 40.6 (1988).

[164] S. Legomsky, *supra* note 125, at 148, *citing* K. Davis, *supra* note 56, and other authority.

[165] Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 n. 4 (1986); Rusk v. Cort, 369 U.S. 367, 380 (1962).

[166] *Developments, supra* note 84, at 179; For an excellent analysis of the plenary power doctrine, *see* Legomsky, *Immigration Law and the Principle of Plenary Congressional Power,* (1984) Sup. Ct. Rev. 255.

> is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practice of other nations to ascertain the limits?[167]

Questions remain. Although it is hard to dispute that a court may acquire jurisdiction over an immigration issue "only by acts of Congress [and not by] an act of God,"[168] there is something mystical or transcendental about the concept of plenary power as a judicially created means of refusing to review an issue.

The courts have given essentially four reasons for the doctrine: plenary power is inherent in sovereignty; the political question doctrine requires the courts to defer to political authority; admission to the United States is a privilege, not a right, and therefore provides no requirement of court review; and Congress, if it wanted, could do as it pleases to govern activity abroad because neither the Constitution nor the courts have extraterritorial authority over the government's conduct abroad. Each of these reasons merits analysis.

1. The "Inherent Sovereignty" Rationale

Are plenary powers to control immigration "inherent in sovereignty?" That is, does international law confer on states an unlimited right to exclude aliens? If so, then the doctrine, as it has shaped the reviewability of visa denials, becomes a matter solely of constitutional law in a strictly domestic sense. The central considerations would then become the "political question" doctrine (that is, the proper allocation of powers among the branches of government) and the scope and extent of constitutional protections of individuals. If, however, international law imposes limitations on a state's exclusion of aliens, the "plenary" powers of Congress and the Executive are qualified accordingly. The question then becomes whether such a rule of international law has been incorporated into domestic law, thereby constraining Congress, requiring execution by consular officers and other authorities, and encouraging (though not mandating) normal review by the courts.

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[167] Fong Yue Ting v. United States, 149 U.S. 698, 737 (1893) (Brewer, J., dissenting).

[168] Te Kuei Liu v. INS, 645 F.2d 279, 285 (5th Cir. Unit A May 1981), *vacated and remanded on other grounds sub nom.* W. Y. Moberly, Inc. v. United States, 825 F.2d 391 (Fed. Cir. 1987).

International law does, in fact limit sovereignty. Even if, arguably, a state derives powers that inhere in sovereignty, "[s]overeignty is not a matter of absolutes."[169] To the contrary, the Supreme Court has made clear that "the United States has a vital national interest in complying with international law."[170]

The opinions in the *Chinese Exclusion Case* and its progeny[171] that first formulated the doctrine of a plenary power of Congress, inherent in sovereignty, to exclude aliens, were themselves qualified.[172] That is often forgotten.

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[169] Remarks by Guy Goodwin-Gill, Senior Legal Advisor, U.N. High Commission for Refugees, 1986 Proc. Am. Soc'y. Int'l L. 96, 112 (1988).

[170] Boos v. Barry, 108 S. Ct. 1157, 1164 (1988).

[171] Chae Chan Ping v. United States, 130 U.S. 581 (1889) is the most important of several Chinese and Japanese exclusion cases of the same era. Nishimura Ekiu v. United States, 142 U.S. 651 (1892) converted the power of exclusion from one "incident in sovereignty," as defined by the *Chinese Exclusion Case*, *id.*, into one "inherent in sovereignty" 142 U.S. at 659. *See also* Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[172] *See* Nafziger, *The General Admission of Aliens Under International Law*, 77 Am. J. Int'l L. 804, 825-28 (1983). For example, the *Chinese Exclusion Case* acknowledged that all governmental powers "are restricted in their exercise... by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations." 130 U.S. at 604. The proposition that a state has a right to exclude any or all aliens, as a matter of its inherent sovereignty, is incorrect for several reasons. The author has summarized these reasons as follows, beginning with a reminder that authority for the proposition qualifies it considerably. Thus,

It is important to note, also, that both the *Chinese Exclusion Case* and *United States v. Curtiss-Wright Export Corp.*,[173] which established the inherent powers of the President in foreign affairs, were premised not on some categorical imperative of state sovereignty, but on the proper role of nation-states in the international system, defined by (and limited to) the necessity of controlling international relations within a global system. Such issues of provenance and correct interpretation are, however, relatively insignificant because the absolutist version of the plenary power doctrine is more fundamentally flawed: It ignores international law.

International law establishes a qualified duty to admit aliens.[174] Although a state clearly has a right to exclude

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> [J]uristic writing relied on to support the proposition requires legitimate reasons for exclusion in individual cases, such as necessity or self-preservation. States have customarily admitted aliens and have at times considered themselves bound to justify exclusion on grounds of public safety, security, public welfare, or threat to essential institutions. Although some courts may have characterized the practice of admission as a voluntary waiver of the right to exclude or a self-imposed limit on the exercise of the right, it is reasonable to regard the practice and the accompanying justification as recognition of a qualified duty to admit some aliens in some circumstances. Moreover, commonly cited judicial opinions and related authority, at least in English-language sources, are unconvincing; they often misinterpret other authority, contradict contemporaneous statements of *opinio juris*, and rest on questionable, often racist presumptions. The international significance of migration and the interdependence of states lend support to the argument that the general admission of aliens should not be regarded as an untrammeled discretionary power within the exclusive domestic jurisdiction of states. Therefore, although a state has no duty to admit all aliens who might seek to enter its territory, [it has] a qualified duty to admit aliens when they pose no danger to the public safety, security, general welfare, or essential institutions.... Admittedly, this formulation is so broad as to permit expansive discretion by states, but affirming it may encourage states, in their mutual interest, to develop more precise rules, principles, and procedures to govern the general admission of aliens.

Id at 804-05.

[173] 299 U.S. 304 (1936).

[174] Nafziger, *supra* note 172, at 845; Boswell, *Rethinking Exclusion--The Rights of Cuban Refugees Facing Indefinite Detention in the United States*, 17 Vand. J. Transnat'l L. 925, 943, 953, 954, 969 (1984). A leading expert has observed that since the early 1970's there has been an "increasing penetration of international law" into state practice concerning migration. Therefore, he writes in the second edition of his treatise, "[l]ess space is devoted to dispelling the notion that the control of nationality and

aliens, the more important question is the extent of that right.[175] It is neither plenary, on the one hand, nor insignificant on the other. Even those jurists who recognize no limited right of entry ask whether "the regulation of entry must not at least be made subject to control for arbitrariness."[176]

The general content of a state's qualified duty to admit aliens is quite clear. Under customary international law, a state may legitimately exclude aliens only if, individually or collectively, they pose a danger to its public safety, security, general welfare, or essential institutions.[177] Thus, for example, the United States can (and does) routinely exclude individual aliens who pose specific threats, which are defined under the INA as grounds of ineligibility. Also the United States can (and does) exclude aliens collectively if their numbers, for example, pose an aggregate danger to the general welfare, as reflected, for example, in preference quotas for immigrant visas.

It is very important to resist the notion that a sovereign state has an unlimited right to exclude aliens and that this right is somehow, mystically, "inherent in sovereignty." States unquestionably may control immigration, and exclude aliens, but their right to do so is not unlimited. Failing to acknowledge the obverse, qualified duty to admit aliens inhibits international cooperation in controlling immigration and rationalizing national exclusionary laws.

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migration falls within the reserved domain [of sovereign discretion]. The qualifications that need to be made to that assertion are now so clear that they speak for themselves." R. Plender, International Migration Law xiv (2d ed. 1988).

[175] "No one doubts that states have, in accordance with international law, a right both to exclude and to expel foreign nationals. What may be disputed, however, are the absoluteness of those rights, their extent, and the modalities of their application."

Remarks of Guy Goodwin-Gill, *supra* note 169, at 96.

[176] *See* Wolf, *supra* note 6, at 1886.

[177] Nafziger, *supra* note 172, at 846. *See also* Justice Marshall's statement that "[g]overnment may prohibit aliens from even temporary admission if exclusion is necessary to protect a *compelling governmental interest. Actual threats to the national security, public health needs, and genuine requirements of law enforcement are the most apparent interest that would surely be compelling.*" Kleindienst v. Mandel, 408 U.S. 753, 783-84 (1972) (Marshall, J., dissenting) (emphasis added).

Even though international custom, in the face of sovereignty, clearly reveals a long-established practice of states to admit *some* aliens, the notion of unlimited sovereignty dies hard. That notion does not, however, accurately describe the general practice of states, as a matter of complying with the law (*opinio juris*). The notion of unlimited sovereignty has nevertheless had the unfortunate effect of discouraging international cooperation in controlling human migration and, most importantly for the present discussion, it explains the troublesome, transmogrified doctrine of plenary power. It may be possible sometime to reverse the *Chinese Exclusion Case*, as a racist relic,[178] but that would be of less significance than affirmatively acknowledging now the qualified duty of states to admit aliens.

To return to the specific issue of visa denials, consular officers must execute the law, and that includes international law.[179] They do, then, have an obligation to ensure that, individually and collectively, rejected applicants for visas pose a danger to the public safety, security, general welfare, or essential institutions of the United States. In effect, Congress has assimilated much of this rule into the INA. Discretion to make visa determinations has been confined and structured by INA and State Department regulations, but there is still a margin of consular discretion that should be constrained by the rule of customary international law, as stated above.

It might nevertheless be argued that Congress has never explicitly implemented this rule of international law. Thus, even if the United States *qua* sovereign is bound by the rule, neither consular officers nor courts are likewise bound as a matter of "domestic" implementation of the law. This argument, consistent as it might seem to be with the dualist approach[180] to international law that dominates constitutional theory, nevertheless fails because, as will be discussed, the rule requires no special Act of Congress to bind the courts and political branches alike.

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[178] *See* Westen, *The Place of Foreign Treaties in the Courts of the United States: A Reply to Louis Henkin*, 101 Harv. L. Rev. 511, 522-23 (1987).

[179] For example, INA § 101(a)(17), 8 U.S.C. § 1101(a)(17) defines "immigration laws" to include "*all* laws [without qualification], conventions and treaties of the United States relating to the immigration, exclusion, deportation, or expulsion of aliens" (emphasis added).

In an Advisory Opinion concerning the obligation of the United States to arbitrate a dispute, the World Court confirmed "the fundamental principle of international law that international law prevails over domestic law."[181] Although ordinarily the dualist approach would distinguish international obligations from domestic enforceability of them, the World Court's reference in that case was to an Act of Congress that potentially affected relations with resident aliens, by purporting to close down their Mission to the United Nations. Although the Advisory Opinion did not explicitly reach the issue of a State's competence, according to the dualist approach, to execute a law domestically that would violate international law, the Court had earlier declared that "the principles and rules concerning the basic rights of the human person" impose obligations *erga omnes* on States--that is, obligations to the international community as a whole.[182] As early as the eighteenth century the jurist Emerich de Vattel, who influenced the framers of the Constitution, confirmed that states must "fulfil the duties of humanity toward strangers."[183] It

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[180] *See* J. Starke, Introduction to International Law 69-70 (9th ed. 1984). The dualist approach views international and municipal (domestic) legal systems as distinct, though interrelated.

[181] Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreements of 26 June 1947, 1988 I.C.J. 12, 34 (Advisory Opinion of April 26); *accord, id.* at 42 (Separate Opinion of Schwebel, J.).

[182] Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain), 1970 I.C.J. 4, 32 (Judgment of Feb. 5).

[183] E. de Vattel, The Law of Nations, or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns lx-lxi (J. Chitty ed. 1876). This reflects the first hundred years of United States policy. For example, the Burlingame Treaty of 1868 between the United States and China provided as follows:

> The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, of trade, or as permanent residents.

follows that States have an obligation to the international community, *erga omnes*, to ensure that their laws do not violate such important human rights as the qualified duty to admit aliens. Domestically, the federal government must fulfill the international duty directly, *erga omnes*, without the kind of agreement with another state or states that ordinarily might be seen to require special implementation by Act of Congress.

Constitutional practice itself supports the direct applicability of such international rules. In the earliest days of the Republic, international law was deemed to be "part of the law of the land to be ascertained *and administered*, like any other, in the appropriate case."[184] Thus, "[d]uring the eighteenth century, it was taken for granted on both sides of the Atlantic that the law of nations forms a part of the common law."[185] Later, in 1865, an Opinion of the Attorney General confirmed the practice that

> the law of nations [is] a part of the law of the land. . . Hence Congress may define those laws, but cannot abrogate them. . .[they bind] the departments and citizens of the Government, though not defined by any law of Congress.[186]

In *The Paquete Habana* the Supreme Court established that "[i]nternational law is part of our law,"[187] that is, the Supreme Law of the Land, regardless of whether it takes the

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Treaty with China, July 28, 1868, United States-China, art. V, 16 Stat. 739, T.S. No. 48.

[184] Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. Pa. L. Rev. 26, 26 (1952) (emphasis added).

[185] Filártiga v. Pena-Irala, 630 F.2d 876, 886 (2d Cir. 1980), *citing* 1 Blackstone, Commentaries 263-64 (1765-69).

[186] 11 Op. Att'y Gen. 297, 299-300 (1865), *quoted in* Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 Va. J. Int'l L. 394, 418-19 (1988). Accord, Boswell, *supra* note 174, at 966.

[187] 175 U.S. 677, 700 (1900); (*quoted without qualification* in First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 623 (1982)).

form of a treaty, custom, or general principles. *The Paquete Habana* provided specifically that international law

> must be ascertained *and administered* by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators....[188]

The concluding language of this famous rule ("For this purpose...") has been controversial. It has been argued that international custom can be rejected domestically by a prior *or* subsequent controlling act of the federal government.[189] This interpretation, however, accords with neither the text, context, nor precise holding in the case. Instead, the correct interpretation seems to be that the words "[f]or this purpose" refer to the process of ascertaining the content of the international law upon which a "question of right" depends. Thus, courts are obligated to consult treaty law or other federal authority; if this search fails to locate the applicable rule of *international* law, the courts must turn to international custom to do so.[190]

Because custom continues until it changes, it is reasonable to conclude that it is constantly "re-enacted," such that it cannot be superseded by a later-in-time enactment by Congress.[191] Judicial decisions from the period of the *The Paquete Habana* decision support this interpretation of that key authority.[192] Moreover, the "later-in-time" rule of positive enactment presumes the availability of reparations to meet international obligations as a result of a nullity by later enactment. Where no such reparations are made to other states, as in immigration cases, the later-in-time rule is therefore inoperable because a state cannot use its domestic law as an excuse to avoid its international obligations.

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[188] *Id.* (emphasis added).

[189] Comm. of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 939 (D.C. Cir. 1988); T. Franck & M. Glennon, Foreign Relations and National Security Law 113 (1987).

[190] *See* Sweeney, *Quousque Tandem o Paquete Habana* (Letter to the Editor in Chief), 81 Am. J. Int'l L. 637, 639-40 (1987).

[191] *See* Paust, *supra* note 186, at 441.

[192] *See, e.g.*, The Schooner Jane, 37 Ct. Cl. 24, 29 (1901); The Ship Rose, 36 Ct. Cl. 290, 301 (1901); The Schooner Nancy, 27 Ct. Cl. 99, 109 (1892).

Even states of the Union accept this view. Thus, rules of evidence incorporate an unqualified version of *The Paquete Habana* for purposes of pleading and proving international foreign law,[193] and, according to state common law, "international law is a part of the law of every state which is enforced by its courts without any constitutional or statutory act of incorporation by reference [and is] legally paramount whenever international rights and duties are involved before a court having jurisdiction to enforce [it]."[194]

It might be argued that the qualified-duty-of-states rule needs further elaboration to be suitable for domestic implementation. The rule is, however, no less precise than many rules of international law that states are required to further elaborate within the margin of discretion one would expect in the decentralized global system. Thus, it has all the hallmarks of legitimacy: determinacy, symbolic validation, coherence and adherence.[195]

In sum, the United States may exclude aliens only if, individually or collectively, they pose a danger to the public safety, security, general welfare, or essential institutions. Although this rule does not, of course, mandate reviewability of visa denials, it does challenge a basic premise of nonreviewability--the plenary power of Congress, inherent in sovereignty to exclude any or all aliens--that has played a major role in establishing judicial self-limitations to review visa denials. As the law of the land, the rule binds the Executive, arguably confers justiciable rights on injured persons, and, under 28 U.S.C. § 1331, engages the subject-matter jurisdiction of federal courts. Thus, Congressional power and Executive action to exclude aliens are both limited, at least by the margin of additional responsibility entailed in the qualified duty of states to admit aliens. In practical terms, "limited judicial responsibility" would seem to include reviewability of visa denials contrary to the qualified duty.

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[193] *See, e.g.*, IA Alaska Rules of Court Proc. & Admin., Evidence Rules Commentary, Rule 202 (1988).

[194] Peters v. McKay, 195 Or. 412, 426 (1952, as supplemented), 238 P.2d 225, 231 (Or. 1951), *petition for reh'g denied*, 195 Or. 412, 246 P.2d 585 (1952).

[195] *See* Franck, *Legitimacy in the International System*, 82 Am. J. Int'l L. 705, 712 (1988).

Even if the courts cannot or will not begin with a clean slate of this sort, they have a duty under the long-heeded rule in *Murray v. Charming Betsy*[196] to construe statutes, including the INA, so as to comply with international law. Thus, for example, the *Mandel* test of a "facially *legitimate* and bona fide reason" to support Executive discretion, would seem to require a showing that, to be "legitimate," even only "facially" so, a visa denial must be consistent with conventional and customary international law.

2. The "Political Question" Doctrine

We have seen that the plenary power of Congress must be derived from the Constitution and not from some transcendental concept of "inherent sovereignty." Judicial reliance on that concept alone, as it grew out of the *Chinese Exclusion Case* and its progeny, would be unsatisfactory.[197] Even if it were possible to justify an unlimited right to exclude aliens under a concept of "inherent sovereignty," which it is not, a logical leap is necessary to establish that the judiciary must therefore defer to Congress.

A more convincing theory is that because "immigration" has foreign elements by definition and immigration-related decisions may affect foreign affairs, all decisions to exclude aliens are "political questions" that have been entrusted to the political branches of the government, not the judiciary.

There is certainly merit in the contention that issues of excludability *may* affect foreign relations and thereby usurp the foreign affairs powers of the political branches and, if the courts do not act consistently with foreign policy, potentially embarrass the State in its conduct of foreign affairs. National security is a legitimate consideration, best managed by the political branches of government. Although it may be questionable whether the Border Patrol should be characterized as fighting on the "Front Lines," as bumper stickers printed by the federal government proclaim, immigration nevertheless can be of national security significance. Thus, the decision to exclude Yasser Arafat from speaking at the United Nations,[198] although it may have violated United States obligations, was clearly of the sort that raised significant political and security issues[199] and might therefore have been nonjusticiable.

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[196] 6 U.S. (2 Cranch) 64, 117-18 (1804).

[197] *See* Comment, *Immigration and the First Amendment*, *supra* note 4, at 1912. "Reliance on the *Chinese Exclusion Case* is a bit like reliance on *Dred Scott v. Sandford* or *Plessy v. Ferguson*. Although the Supreme Court has never expressly overruled the *Chinese Exclusion Case*, it represents a discredited page in the country's constitutional history." Shapiro, *supra* note 4, at 942.

This is not to say, however, that immigration issues always or even usually affect foreign relations. Neither the foreign relations power nor the political question doctrine should be debased further by applying them to immunize all visa denials from review. It is doubtful, for example, whether an elderly but healthy Australian's desire to visit her relatives in Los Angeles, or the similar desires of even a hundred such applicants for a visa, would raise genuine issues of foreign policy under normal circumstances. The smaller the world gets, the less plausible this argument seems. The Rule in Arafat's Case should not be generalized to render all visa denials non-reviewable.

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[198] N.Y. Times, Nov. 27, 1988, at 1, col. 6; *id.*, Nov. 28, 1988, at 1, col. 4; *id.*, Dec. 5, 1988, at 7, col. 1 (national edition); Recent Development, *International Agreement: United Nations Headquarters Agreement* -- Dispute Over the United States' Denial of a Visa to Yasir Arafat, 30 Harv. Int'l L. J. 536 (1989).

[199] *Id.* Yasser Arafat was apparently unable to overcome grounds for excluding him as a terrorist under INA § 211(28)(F), 8 U.S.C. § 1181(28)(F). The link between his status as leader of the Palestinian Liberation Organization (PLO) and the term "terrorism" is the controversial Anti-Terrorism Act of 1987, 22 U.S.C.A. §§ 5201-5003 (West Supp. 1988). *See* United States v. Palestinian Liberation Organization, 695 F. Supp. 1456, 1472 (S.D.N.Y. 1988). The court referred to the legislation as the "*Anti-PLO* Terrorism Act of 1987," *Id.* at 1460, n. 12 (emphasis added). *See also* Mendelsohn v. Meese, 695 F. Supp. 1474. (S.D.N.Y. 1988). In executing this Act of Congress, Secretary of State Shultz evidently refused to waive the grounds of ineligibility after a more or less formalistic visa denial by a consular officer in Tunis. Telephone interview with Cornelius Scully III, Director, Office for Regulations & Legislation and Advisory Assistance, U.S. Department of State (Dec. 13, 1988).

The political question doctrine should not be controlling because it is not compelling. First, the original intent of the Constitution did not embrace inherent *executive* powers, at least.[200] To be sure, the Constitution is a dynamic document, requiring interpretation in the light of constitutional practice. Modern interpretation, however, does not bolster the doctrine.

Second, the political branches have themselves allocated much decision-making about immigration, not to the State Department but to the Department of Justice. The implication is that in the view of Congress, at least a large number of immigration-related decisions apparently do not involve foreign affairs to the extent that they should be insulated from court review. Do even the political branches know what are "foreign affairs" in these days of global movement of persons and property?

Third, if visa decisions are essentially political and foreign-policy sensitive, why did Congress choose to insulate them under INA § 104(a) from review by the Secretary of State?

Fourth, even if, arguably, a particular visa denial is of foreign policy significance, it is likely to provoke a foreign complaint, ironically, *only if* the issue is deemed to be nonjusticiable. It is highly unlikely that a foreign government would complain, to the embarrassment of Washington, because court action might allow one of its citizens to obtain a visa. This might be the case, for example, if the visa applicant were from a source country with strict emigration controls, but the policy of the United States against such controls, not to mention international law, would be sufficient to overcome objections of a foreign government in such cases. In any event, this is an exceptional case, like the case of Yasser Arafat, which could legitimately fall within the political question doctrine, without stuffing all visa denial cases into that already overloaded category.

Fifth, to the extent that review, or even the prospect of review, generally encourages the issuance of visas, it advances one objective of foreign policy stated by the Visa Office, namely, of promoting international travel to this country. Not only has the Executive "stressed the importance of facilitating travel," but has instituted a number of procedures to "expedite the necessary action."[201]

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[200] *See* L. Levy, Original Intent and the Framers' Constitution (1988).

Finally, not all issues involving or impinging upon foreign affairs are "political questions." According to *Baker v. Carr*,[202] it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[203] The classification under *Baker v. Carr* of what is nonjusticiable and what is not requires a "discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing."[204] None of the five "political question" considerations[205] would seem to require courts to defer routinely to consular discretion. Criteria and principles under *Baker v. Carr* are quite capable of distinguishing justiciable from nonjusticiable issues.

Given that courts regularly review a vast array of immigration decisions even though they all might be seen to possess some "foreign affairs" dimension, there is no compelling reason, in itself, to carve out an exception for visa denials. There should always be *some* deference of courts to administrative agencies in the absence of statutory provision to the contrary, but as the Supreme Court wrote in *INS v. Abudu*, "*all* adjudications by administrative agencies are to some degree judicial and to some degree political"[206]. The real question becomes, not whether a particular case is justiciable, but what the standard of review should be in particular cases. The "political question" doctrine might then be reserved for those few cases where the court has concluded that, for an identifiable foreign policy or national security reason, applying the normal standard of review would intrude unconstitutionally in the political domain.[207]

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[201] Visa Report, *supra* note 1, at 1.

[202] 369 U.S. 186 (1962).

[203] *Id.* at 211.

[204] 369 U.S. at 217.

[205] Namely,

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217. *See* Note, *First Amendment Limitations on the Exclusion of Aliens*, *supra* note 4, at 185-91.

One final note: there is a foreign affairs exception to the APA that excludes from its *rule-making* requirements intergovernmental matters of an international nature.[208] It is clear, however, that immigration rules do not fall within this exception such as to justify limited or nonreviewability of denials under the rules.

3. The Right/Privilege Distinction

The old distinction between a right and a privilege presents another plausible rationale for an unusual deference of the judiciary to consular discretion and to deny standing to prospective plaintiffs. Thus, in *United States ex rel. Knauff v. Shaughnessy*, the Court held that admission into the United States is a privilege "granted to an alien *only* upon such terms as the United States shall prescribe."[209] An alien was thereby excluded without a hearing because he had no constitutional rights. The era of constitutional history that attempts to distinguish a right from a privilege is, however, past. *Goldberg v. Kelly*[210] refused to give any practical effect to this anachronistic distinction. Too often, analysis under the right/privilege distinction was tautological--a particular value was a privilege because it had been established to be one--rather than functional.

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[206] 108 S. Ct. 904, 914 (1988) (emphasis added).

[207] *See* Legomsky, *supra* note 166, at 263-64, 268.

[208] 5 U.S.C. § 553(a)(1).

[209] 338 U.S. 537, 542 (1950) (emphasis added).

[210] 397 U.S. 254 (1970).

Calling a relationship with something of value a "right" as opposed to a "privilege" is mere labeling. Today, the concept of legitimate expectations generally prevails over the semantic distinction.[211] To the extent that the distinction may have survived in one exclusion case,[212] it has been reduced to *dicta*.

4. The Extraterritoriality Argument

An argument related to the right/privilege distinction is that the Constitution, with its provisions for the judiciary and the Bill of Rights, does not apply abroad. Legislation governing the visa process abroad, as well as visa decisions by consular officers, are thus exempt from constitutional controls. This argument persists even though *Mandel* itself permitted a non-resident alien to challenge a visa denial abroad.[213] The territorial restriction is generally premised on two theories: that in the international system states have competence to apply their law only within their own territory, and that the Lockean concept of a constitution as a social contract between citizens and their government thereby denies rights to aliens.

The first theory is no longer valid. Within limits set by international law, states regularly extend their authority abroad, on any of several internationally accepted bases of jurisdiction.[214] Certainly there is no international legal barrier to the extension of human rights protection abroad so long as it would not intervene illegally in the domestic jurisdiction of another state. The federal government may, and does, apply the Constitution abroad, not only to govern its daily routine, but to control the acts of government officials vis-a-vis others.[215] As in *Mandel*, non-resident aliens, though physically located abroad, apparently have standing to challenge their exclusion.[216]

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[211] For an interesting comparison of English and American law, *see* Riggs, *Legitimate Expectation and Procedural Fairness in English Law*, 36 Am. J. Comp. L. 395 (1988).

[212] Landon v. Plasencia, 103 S. Ct. 321 (1982). *See also* Smolla, *The Reemergence of the Right - Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 Stan L. Rev. 69 (1982)(constitutionally-derived distinctions based on existence or not of a "life, liberty, or property" interest are analogous to the right/privilege distinction).

[213] 408 U.S. at 762.

[214] *See, e.g.*, L. Brilmayer, An Introduction to Jurisdiction in the American Federal System 297-315 (1986).

The social contract theory of the Constitution is also dubious. The Constitution represents the will of the people to establish a limited form of government, rather than a bargaining away of their rights.[217] Moreover, as David Hume noted,[218] the social contract theory and its rationale for allegiance cannot explain why, in practice, aliens should be subject to (though not entitled to rights derived from) local law, including a Constitution to which, of course, an alien could not have freely consented. Of course, a State may make decisions about the applicability of its laws to aliens and may regularly exclude them, within the limits of international law. Related questions of constitutional authority should not be decided by social contract theorizing, however, but by direct constitutional interpretation.

Finally, it should be noted that protection under the APA is not limited geographically. The APA speaks in terms of "any person," *not* "any citizen" or "any person physically present in the United States."[219] In sum, it is understandable that the first cases struggled to find justifications for nonreviewability. A lack of jurisdiction was as hard to justify then as it is today.

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[215] *See, e.g., United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974); United States v. Tiede, 86 F.R.D. 227 (U.S. Ct. Berlin 1979); Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 Va. J. Int'l L. 741 (1980); Reid v. Covert, 354 U.S. 1 (1957); *but see* Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976); Stephan, *Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens*, 19 Conn. L. Rev. 831, 834-45 (1987).

[216] *Mandel*, 408 U.S. 753.

[217] *See* Comment, *Immigration and the First Amendment*, *supra* note 4, at 1914.

[218] Hume, *Of the Original Contract*, in Social Contract 145, 156 (E. Barker ed. 1970).

[219] *See* Estrada v. Ahrens, 296 F.2d 690, 694 (5th Cir. 1961).

Thus, the plenary power doctrine is illogical and increasingly subject to attack. Even those who may disagree with this attack would recognize that, despite some judicial pronouncements, Congress has never barred the courts from reviewing visa denials and, for reasons that will be presented later, should expect that the courts will undertake review.

C. Positive International Law

International law establishes not only a customary, qualified duty to admit aliens, but certain obligations under treaties, executive agreements, and other formal instruments of international law. Some of these can be adjudicated; others lack the teeth of justiciability. INA § 101 (16) defines the term "immigration laws" to include "all laws, conventions and treaties of the United States."[220] A complete list of these instruments lies outside the scope of the instant analysis. Some of them, however, are worth mentioning. They include bilateral treaties of establishment, investment treaties and friendship, navigation and commerce treaties that provide for a mutual extension of national treatment to each other's traders and investors; multilateral treaties, such as the United Nations Headquarters Agreement, that require access of diplomats to international organizations headquartered in the United States; the U.S.-Mexican Joint Statement that require cooperation in controlling the flow of undocumented aliens;[221] the Helsinki Accords[222] that prompted the McGovern Amendment and otherwise imposes obligations to facilitate family reunification and transnational marriages within the region of Europe and North America; and the Protocol to the Convention related to the Status of Refugees.[223] Important instruments that are not binding on the United States include a number of bilateral and regional agreements, particularly those of the European Communities on freedom of movement and labor,[224] and the treaty between the United Kingdom and China that defines the new immigration law of Hong Kong.[225] While none of these obligates any state to accept particular numbers of aliens, they all impose requirements that restrict consular discretion to deny visas.

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[220] 8 U.S.C. § 1101 (17).

[221] Agreement on Illegal Entry of Migratory Workers, July 18, 1973, United States-Mexico, Joint Statement, 26 U.S.T. 1724, 1727-28, T.I.A.S. No. 8131.

[222] Conference on Security and Co-operation in Europe: Final Act, *reprinted in* 14 International Legal Materials 1292 (1975) [hereinafter cited as Accords]. Although arguably not legally binding in themselves, the Accords provide a comprehensive, morally compelling expression of norms that, by influencing state behavior, may constitute *lex ferenda.* See Nafziger, *The Right of Migration Under the Helsinki Accords*, 1980 S. Ill. L.J. 395 (on state obligations under the Accords).

D. Practical Considerations

Although none of the reasons that have been advanced to justify nonreviewability or very limited reviewability is sufficiently persuasive in itself, it might be argued that, taken together, they at least rationalize a practice that has been fairly stable over time, and is apt to continue as long as the law stays the same. Therefore, as time goes on and Congress revisits the process, practical considerations are apt to be influential, one way or another.

The judiciary is understandably skeptical about the weight to be given practical considerations when "fundamental rights are involved."[226] Although "[p]rocedure by presumption is always cheaper and easier than individualized determination,"[227] administrative convenience by itself is not apt to be a persuasive justification for cutting the corners of individual claims. Practical considerations are, however, highly influential in either inhibiting or encouraging and guiding legislative or administrative reform.

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[223] Protocol relating to the Status of Refugees, *done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

[224] *See* Oellers-Frahm, *The Contribution of the Council of Europe to the Legal Position of Aliens*, in Frowein & Stein, eds., *supra* note 6, at 1725, 1729-30; Stein & Thomsen, *The Status of the Member States' Nationals under the Law of the European Communities*, in *id.* at 1775, 1791-3; Plender, *supra* note 6, at 542-46.

[225] Agreement on the Future of Hong Kong, Dec. 19, 1984, United Kingdom-China, art. XIV and Explanatory Notes, § XIV, Draft *reprinted* in 23 Int'l Legal Materials 1366 (1984); 24 Int'l Legal Materials 1185 (1985) (providing further information on status of the Agreement).

[226] Fiallo v. Bell, 430 U.S. 787, 813 (1977).

[227] Stanley v. Illinois, 405 U.S. 645, 656 (1972).

Several practical considerations have played an important role in forestalling legal reform. These considerations run through the general debate on reviewability as well as interpretations of the "committed to agency action" wording of the APA and other specific provisions of the law. They fall into three general categories: the freedom of consular officers to perform their functions; the feasibility of more formal, outside review; and the expectations of applicants.[228] These categories of practical considerations correspond roughly to the three basic values of review: accountability, uniformity or consistency, and due process.

1. Merits of Freeing Consular Officers from Outside Review

a. Expertise of Consular Officers

Consular officers are well-trained, representing one of the most carefully selected, career-groomed corps of government, the Foreign Service. As Part IV indicates, the level of competence and morale among consular officers is high. Most officers have had special training in the visa process and are familiar with the characteristics and idiosyncracies of the local culture. They generally have an experienced eye for fraud and chutzpah[229] by applicants.

On the other hand, to err is human and all exercise of discretion is potentially fallible. That is why the decisions of other agencies of government are subject to review despite the expertise that reposes in those agencies. Interpretations by consular officers of such terms as "public charges" and "reason to believe" are necessarily subjective, and guidelines are not always effective in promoting uniformity or consistency.[230] To the extent that errors are avoidable, the prospect of review would also encourage accountability, that is, it would encourage consular officers to maintain a high level of care and commitment to applying the law correctly. No one wants to have a decision reversed by an outsider.

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[228] The first two of these categories are proposed and discussed in Note, *supra* note 121, at 1157-64.

[229] *See, e.q.*, Grimes, *Chutzpah by a Visa Applicant*, State, May 1988, at 12.

Most importantly, a belt-tightening budget restricts the scope and efficacy of consular expertise. Many consulates are so financially hard pressed that they must sacrifice the time per applicant that would best take advantage of the expertise of consular officers. "Batching" or group processing of applications in the same class may be necessary. On-line interviews of applicants for nonimmigrant visas average a minute or less because of severe budget constraints that spread on-line officers very thinly. There is little time carefully to investigate documents and employment letters. Officers may rely heavily on income poverty and other guidelines without undertaking a more effective, case-by-case appraisal of applicants; similarly, supervising officers may not have enough time to review each visa denial thoroughly.[231] Spot checks or random sampling of denials is often the only alternative. Binding decisions on interpretations of the law by the Visa Office, Congressional inquiries, and other intra-Departmental processes of review, though important, are too sporadic to substitute for careful review within the consulate. Thus, budget constraints lead to a need for outside review. Internal review procedures are deficient, not because the working relationship between consular and reviewing officers is too cozy to ensure an objective review, as is sometimes claimed, but because there is too little time and money for a thorough review of all denials.

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[230] One study reported that:

> Departmental efforts to structure consular officer discretion under the public charge provision have been minimal and sometimes confusing . . .
>
> The guidelines and policy statements existing under the public charge provision have met with mixed success. Some consular officers are flexible in accordance with stated policy. Others are inflexible and rely too heavily on the income poverty guidelines . . .
>
> The conclusion is that consular officers exercise a large amount of discretion to issue or refuse immigrant visas under the public charge provision. Major Departmental policies are contradictory, so an officer is free to rest a decision on the policy of flexibility or on the presumption of ineligibility. Either policy is acceptable. Key terms are ill-defined, so a consular officer may decide for himself what constitutes public assistance, who are dependent family members, and whether a head-of-household applicant may immigrate without his family. Indeed, two consulates [the authors visited] have opposite policies on the latter issue. Income documentation requirements are inexact, so an officer may request an extensive array of financial evidence, yet disbelieve it.

Study, *supra* note 61, at 124-125.

b. Governmental Interests

Efficient and effective management of the visa process would seem to require speed and finality, insulation of *initial* policy-making from judicial review, and uniformity or consistency of decisions.[232] These normal considerations of public administration may appear to be especially significant in the specific context of consular activity because of possible foreign policy implications of visa decisions. It is, however, highly questionable whether the foreign dimension of consular decisions should routinely set them apart from other types of administrative decisions, such as a "domestic" decision to locate a state penitentiary or nuclear power plant on the Canadian or Mexican border. In any event, review of consular determinations simply applying the INA to the facts in a particular case would not seem to involve, in the words of *Baker v. Carr*, "an initial policy determination of a kind clearly for nonjudicial discretion".[233] Nor is the need for a quick decision

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[231] These problems have persisted for some time. *See id.* at 108, 112, 116, 148.

> Typically, the refusing officer writes a few sentences explaining the grounds of ineligibility on the refusal sheet and attaches any relevant documents supporting the refusal. If an applicant is refused a visa on the ground that he is likely to become a public charge, for example, the consular officer might attach to the refusal sheet a copy of the applicant's job offer as evidence of inadequate income.

Id. at 106-07.

[232] *See* Note, *supra* note 121, at 1157.

[233] 369 U.S. at 217

necessarily strong enough to overcome the need for a more deliberate, potentially correct decision. Delay of a final visa denial to allow for review is not apt to cause the kind of problem that delay of a more truly political decision, such as whether to suspend trade and tariff concessions, is apt to entail.

The need for uniformity or consistency of decisions argues for either greater regulatory control over consular discretion or review of consular decisions. Of these, the former might help alleviate the need for the latter. Regulation is direct, less costly, and potentially helpful to the consular officers in making decisions. Thus, there would seem to be a need to make a number of consular practices more uniform, such as the accessibility of attorneys or other representatives of applicants to the review process; the hospitality to third-country, "orphan" applicants; the extent of pre-screening of applicants; the duration of interviews; the extent of review of visa denials by supervising officers; the capacity of denied applicants to reapply repeatedly; and the timelines for reapplications.

More uniform guidelines and regulations would assist officers in different consulates to reach decisions consistently among themselves, so as to establish uniform interpretations of national immigration policy and law. There should be room for local discretion and even experimentation in some cases, but eventually, more uniform procedures and practices among the consulates would obviate a good deal of the need for review.

The government has an interest not only in encouraging good exercise of consular discretion, but in avoiding fraud and illegal migration by applicants. Ironically, the present system may encourage both by rendering an alien's status reviewable after a fraudulent or illegal entry into the United States, but not necessarily after a legitimate application and denial. This anomaly may encourage applicants to misrepresent or withhold information from a consular officer in the hope of at least getting a more formal review on entry. The prospect of review at the visa issuance stage might encourage prospective immigrants to do it the right way, beginning with a forthright visa application at the consulate.

2. Feasibility of More Formal, Outside Review

Whether the review process is administrative or judicial may affect its feasibility, but most of the critical arguments for or against reviewability apply in either case. Administrative and judicial review should be seen as two segments of legal continuum. This section will, however, note whenever the type of dispute resolution would seem to make a difference.

a. Volume of Prospective Appeals

The prospect of overburdening the State Department or clogging the courts has been an important justification for nonreviewability.[234] Today, perhaps, it is *the* major justification. This rationale at least partially explains INA § 104's mysterious insulation of visa denials from supervision by the Secretary of State, and has been used to support an inference against judicial review drawn from that provision. On the one hand, volume is a serious consideration. There are close to a million visa denials every year. It is difficult to estimate what percentage of denied applicants would take advantage of judicial review if it were available. At a time when the federal courts are already overburdened, authorizing judicial review of all visa denials would therefore be quite risky. On the other hand, barring all judicial review seems unnecessary in order to avoid court congestion. Any burden to the government could be controlled to a large extent by the standard of review selected.[235]

Moreover, it is argued that the volume of appeals of visa denials would be small.[236] Only a small proportion of denied applicants are likely to seek judicial review. Unlike deportation cases, where aliens already in the United States may still have some incentive to file frivolous court actions to obtain delay,[237] the visa applicant waiting to enter has nothing to gain from delay. Further, there are financial costs associated with judicial review, particularly when the alien must arrange for filing on his or her behalf from abroad.

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[234] S. Rep. 1515, *supra* note 88.

[235] *See* Note, *A Case for Judicial Review of Consular Visa Decisions*, 22 Stan. J. Int'l L. 363, 373-74 (1986). *See supra* text accompanying note 88 for a discussion of the legislative intent of INA § 104(a).

[236] *See, e.g.*, Paparelli & Tilner, *supra* note 3, at 1033 (noting a 13-year experience of low volume in appeals of labor certification denials).

The likely demand for judicial review is reflected in the exclusion cases. In fiscal year 1984, for example, thousands of aliens were excluded at U.S. entry points. Yet, only 27 aliens in that year exercised their statutory right to obtain judicial review of their exclusion orders and only 10 of these were non-asylum petitioners.[238] Significantly, these petitioners had already traveled to the United States, often at great expense. Visa applicants would seem even less likely to have actions brought on their behalf in court.

If the burden on the judicial system were still deemed to be excessive, Congress might limit the categories of visas from whose denials appeal could be taken. Thus, it has been suggested that only family reunification cases, national security cases,[239] or cases where the applicant has a "real stake"[240] or "high stake"[241] in obtaining a visa would be reviewable. Gradual inclusion of nonimmigrant visa denials in a review process might begin with a pilot program involving a single class or two of visas, such as treaty trader (E-1) and treaty investor (E-2) visas. In any event, the caseload effect of appeals on the administrative and court systems is unclear. Thus, the system-burdening factor may argue for caution, but would not seem to require timidity to experiment with more substantial administrative and judicial review of visa denials.

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[237] *But see*, even in this instance, the constraints on taking any advantage of a delay pending deportation. 8 U.S.C. § 1105a(a); Haitian Refugee Center v. Civiletti, 676 F.2d 1023, 1032-33 (5th Cir. 1982).

[238] Legomsky, *Forum Choices for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 Iowa L. Rev. 1297, 1402 (1986).

[239] H.R. 1119, 100th Cong., 1st Sess. § 2(b) (1987); Note, *National Security Visa Denials*, *supra* note 4, at 741.

[240] Bernsen, *Consular Absolutism in Visa Cases*, Interpreter Releases, May 2, 1986, at 388, 391; Paparelli & Tilner, *supra* note 3, at 1032-33 (proposing review of all immigrant visa denials and nonimmigrant visa denials "except refusals to alien crewmen and aliens seeking entry merely to tour or transit the U.S. (certain B-2 and all C and D visa applicants). . . the relatively small number of cases in which the alien has a genuine stake in gaining admission, i.e., the cases in which meaningful review is most urgent or important." The excluded categories constitute "over 80% of all nonimmigrant applications." *See also* sources cited at notes 232-34, *supra*; Gonzalez Bill, *infra* notes 337-40.

[241] Martin, Mandel, Cheng Fan Kwok, *and other Unappealing Cases: The Next Frontier of Immigration Reform*, 27 Va. J. Int'l L. 805, 812-13 (1987).

b. Adequacy of the Record

Baker v. Carr, which offers the classic formulation of the "political question" doctrine, recognized that access to governmental information, as a practical-functional consideration, is a legitimate factor in determining justiciability of a particular issue.[242] A very serious problem under present budgetary circumstances is that the record available for either administrative or judicial appeal would understandably be very limited. On-line consular officers must state reasons for visa denials,[243] but they often have too little time to record much more than a citation of authority for a denial, with perhaps a few, scribbled words of factual explanation. Sometimes consular notations are scarely legible. What can an administrative appeals board or court review if the issue is whether an officer has applied the law to the facts and there was too little time to write up the facts or to communicate them clearly and legibly? With more time and resources to write up a clearer, more complete record for appeal, much of this problem would dissolve. Under present budgetary circumstances, it might be unfair to sustain an appeal on the basis of an inadequate record, and yet it also seems unfair to applicants to allow the characteristic, yet understandable, inadequacy of a consular refusal sheet to inhibit a more adequate review process.

The credibility and demeanor of applicants are important factors, too. Although administrative tribunals sometimes defer to assessments of credibility by executive officials, such assessments understandably play a particularly important role in the visa process, and by definition applicants are generally unable to appear in the United States, if need be. Moreover, courts of law are less inclined than administrative tribunals to defer to official assessments of credibility and demeanor.

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[242] 369 U.S. at 217

[243] 22 C.F.R. § 41.121(b), § 42.81(b)(1988).

Voice recordings on cassette tape might substitute for the parsimonious and sometimes cryptic written records of consular adjudications, but involve two problems. First, recording an adjudication could interfere with its integrity. The process might encourage applicants and officers alike to rehearse and perform as they might not otherwise. Even if this did not prove to be a problem, a more substantial problem with a reliance on voice recordings is that they would not convey live images that are critical in determinations of an applicant's credibility and demeanor. Videotapes would largely resolve this problem,[244] but do not seem politically feasible at this time.

c. Efficacy of Discretion

The visa process necessarily relies considerably on judgmental factors of an applicant's demeanor and credibility, as well as evolving circumstances in the local socio-economic environment. These factors argue for a relatively limited standard of review of consular discretion (as opposed to issues of law and fact), such as whether a denial was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[245]

Abourezk v. Reagan adopted guidelines that the Supreme Court had announced in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[246] Accordingly, a court first attempts to determine whether Congress had a specific intent with respect to the issue at hand. This analysis begins with the statute, but may include legislative history and administrative practices. Thus, past consular practices may play an important role in statutory interpretation of such open-textured terms as "public charges." If the court finds a specific intent, it enforces it regardless of the agency's (the consular officer's) interpretation. If, however, Congress does not appear to have specific intent, perhaps deliberately leaving the resolution of an issue to consular discretion, "the agency's interpretation should be accorded great deference and invalidated only if it is not a 'reasonable accommodation of conflicting policies that were committed to the agency's care by the statute....'"[247] Despite this deference, the obvious need for some degree of consular discretion does not in itself bar review, either administratively or in the courts.

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[244] Telephone interview with Angelo A. Paparelli, Member, Board of Governors, American Immigration Lawyers Association (AILA); formerly, Issue Manager for Consular Review and Vice-Chairperson, Visa Office Liaison Committee, AILA (Nov. 25, 1988).

[245] APA § 706(2)(A), 5 U.S.C. § 706(2)(A). *See infra* text accompanying notes 294-95.

[246] 467 U.S. 837 (1984).

d. Standing of Appellants

The few visa denial cases that courts have decided might be read to limit standing to American appellants,[248] either as petitioners for an alien applicant's visa or as parties otherwise sufficiently injured in fact by a visa denial, as in the case of an applicant invited to speak to an American audience. To be sure, non-resident aliens have been included, as in *Mandel*, either as actual or symbolic co-plaintiffs with citizens or permanent resident aliens. If reviewability is not limited to claims brought by citizens or permanent resident aliens, the territorial barrier might seem to pose a serious problem. How, it is asked, would applicants denied a visa effectively pursue a claim in the United States if the subject of their claim, a visa denial, also denies them access to an appellate board or court? What distinguishes exclusion-at-the-border cases is that they involve proceedings in *habeas corpus* "and not otherwise" under INA § 106(b). That is, an alien's presence at the border gives the government a form of custody over the alien that has been interpreted to confer habeas corpus rights.

Limitations on the types of prospective cases subject to review would, of course, affect the issue of standing. Thus, if reviewability is limited to "high stake" cases, standing is of course similarly limited.

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[247] 785 F.2d at 1053 (quoting *Chevron*, 104 S. Ct. at 2783).

[248] *E.g.* Fiallo v. Bell, 430 U.S. 787 (1977); Kleindienst v. Mandel, 408 U.S. 753 (1972); Ali v. INS, 661 F. Supp. 1234, 1246 (D. Mass. 1986).

e. Confidentiality

INA's 222(f)[249] provides that the "records" of the Department of State and of diplomatic and consular officers "pertaining to" the issuance or refusal of visas are to be "considered" confidential. Whether this language was intended to cover individual applicants and refusals or only statistics and other aggregate records of an office is somewhat unclear, although it may have been intended to cover both. A reasonable construction of the language in terms of foreign policy interests and sensitivities that underlie the administration of the INA might limit the scope of the protection to aggregate records, but some individual dossiers of national security significance, such as that of Yasser Arafat, might require protection, as well. Moreover, it seems reasonable to construe the language to protect documentation from access by third persons. Confidentiality therefore ought primarily to protect applicants, whether or not they are more generally protected abroad by the Bill of Rights. If there is any question, INA § 222(f) might be amended to provide for the release of records for administrative and judicial review.

A particular problem has been the nonavailability of Advisory Opinions by the Visa Office. The Freedom of Information Act (FOIA), amending the APA, would seem to require disclosure of the Opinions to visa applicants, but the Visa Office has invoked exemptions to FOIA[250] to justify its

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[249] 8 U.S.C. § 1202(f).

[250]

> (b) This section does not apply to matters that are -
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> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
>
> . . .
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for

refusal to inform applicants of the contents of Opinions. The Opinions are considered to be either national security-sensitive, protected by the INA, or a form of privileged intra-agency communication.

The same section (225(f)) of the statute does allow the Secretary of State discretion, apparently as another exception of INA § 104(a), to make certified copies available to a court which itself "certifies that the information contained in such records is needed by the court in the interest of the ends of justice in a case pending before the court."[251] Presumably, the applicant would then have access to the record on review.

There is at least one major exception to the presumption that an applicant would have access to the record. INA § 235(c)[252] provides for a summary exclusionary proceeding for security reasons following an exclusion order, "without any inquiry or further inquiry by a special inquiry officer." Accordingly, the applicant may be denied access to the factual basis or procedural protections to which he or she would otherwise be entitled. The scope, validity, and applicability in individual cases of this extraordinary provision were incidentally at issue in *Rafeedie v. INS*.[253] *In camera* review may be necessary in some national security

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> withholding or refers to particular types of matters to be withheld
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> . . .
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> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency

Pub. L. 90-23, § 1, 81 Stat. 54 (1967) (codified as amended at 5 U.S.C. § 552 (1982 & Supp. IV 1986)).

The applicable "statute" under FOIA § (b)(3), to which the Visa Office refers, is INA § 222(f), 8 U.S.C. § 1202(f); *see supra* discussion at text accompanying notes 248-49.

[251] 8 U.S.C. § 1202(f). The State Department also makes available some information to the INS, for example, to be used in visa petition revocation proceedings. See United States Department of State, Cable No. 89-State-028963 (Ref. A 84 STATE 213718, B 85 STATE 283796), 66 Interpreter Releases 149 (1989).

[252] 8 U.S.C. § 1225(c).

[253] 880 F.2d 506 (D.C. Cir. 1989).

cases, but the procedure can easily be overused or abused in the absence of clearer guidelines on the scope of a national security exception to due process.

f. Costs

The cost-burden on the government and the taxpayer of improvements in the review process would, of course, depend on their scope and the extent to which some of the cost could be shifted. Financial costs are hard to estimate, but quite likely would be high for an administrative review board. For example, in 1983, a bill would have provided $20 million for the first year of an administrative review system to handle appeals from refused visa applicants, with a staff of administrative law judges and an Appellate Immigration Board.[254] The Asylum Policy and Review Unit, which advised the INS to reconsider 35 denials and referred another 35 cases for reversal by officials, cost about $750,000 in approximately its first year.[255]

User or "appeal" fees have been proposed to defray the cost[256] of administrative review, at least to provide more visa examiners and a limited administrative review board. Such fees, however, have the disadvantage of potentially discriminating against applicants on the basis of wealth and are not entirely consistent with the federal policy of encouraging travel to the United States. Perhaps fee waivers could be made available to the less fortunate--the tired, the poor, and the homeless.

Another type of cost is psychological, namely, the threat and perceived nuisance that review might present to already overburdened consular officers. Nobody likes to be overruled. Moreover, there is sometimes too little love lost between attorneys and consular officers. The aversion of some officers to further involvement of attorneys is understandable. Still, experienced foreign service officers with whom the author talked minimized the psychological cost and were openminded about the possibility of a modest further formalization of the review process. They acknowledged that the guidance and encouragement of greater uniformity it could provide might well make their work easier.

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[254] S. 2222, 97th Cong., 2d Sess. § 125 (1982).

[255] N.Y. Times, Dec. 21, 1988, at 11, col. 1 (national edition).

[256] Telephone interview, *supra* note 244.

3. Expectations of Applicants

The level of expectations of applicants about the issuance or denial of a visa and the adequacy of the review process is of at least some relevance, though perhaps minor, in considering the need for more formal review of visa denials. If applicants do not expect review, there is arguably less need for it. If, however, they expect review and it would be reasonable, it is in the national interest to attempt to protect this country's reputation for due process. The United Kingdom, for example, provides formal administrative review of visa denials.

Unfortunately, little is known about the varying expectations of different nationalities except the obvious: most British and Japanese nationals expect to get visas, whereas other Asians and Mexicans can expect greater difficulty. Most likely, the realistic expectations of applicants fall below the level of concern for them. Given the rather low rate of refusals, the majority of applicants may not be surprised. Even if they are, their expectations may be conditioned by skepticism about administrative practices and determinations of their own governments. On the other hand, an efficient and generous system of visa issuance by the local government may foster expectations of generosity or at least reciprocity by the United States government.

IV. Field Observations and Interviews

A. Introduction: Methodology

Is there a need for changes in the review process? Theoretically, if consular officers always made the right decisions, there would be no need for review. There is also a tolerable margin of error. If, however, some review is necessary, how adequate is the existing process? To recapitulate, it consists of intra-consular review; unofficial monitoring and pressuring by attorneys, the media, non-governmental organizations, and American petitioners on behalf of applicants; Congressional inquiries; opinions from the Visa Office, some binding, some not; Departmental waiver procedures; and very limited judicial review. What would be the benefits of an expanded review process, perhaps providing applicants and petitioners greater access to administrative or judicial review? Would these benefits offset the costs?

To help answer these questions and see the consular process and informal review procedures first hand, the author conducted six sets of field observations and interviews. These took place in 1988 and 1989 at United States consular posts in Guadalajara, Mexico City, Shanghai, London, Warsaw and Krakow. The locations were selected on the basis of the relatively high volume of applications at those posts, the relative importance of all of them in the immigration process, variations among them in types of applicants, the author's ability to comprehend adjudications in Spanish at the Mexican locations, the opportunity in London to investigate a visa waiver pilot program for British tourists, and an already established itinerary for other purposes to the Chinese, Polish and British locations. The author interviewed consular officers at each post; independently communicated with applicants in Guadalajara, Krakow and Shanghai; attended visa adjudications in Guadalajara and Mexico City; and monitored four reviews of visa refusals in Shanghai. Before arrival at the two Mexican posts and Warsaw, the author sent the posts copies of a ten-year old study of consular discretion[257] in order to indicate some questions for discussion. Subsequent discussion at the three posts centered on whether the process of visa issuance, denial and review had changed, and, if so, how and to what extent.

The author also interviewed several practitioners during a conference on immigration law,[258] and communicated with various spokespersons of the American Immigration Lawyers Association (AILA).[259] These inquiries produced a number of insights and stimulated new questions that are reflected throughout this study.[260] The summary that follows is by no means scientific, but "impressions are experience."[261]

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[257] Study, *supra* note 61. This study consisted of interviews at consulates in Canada and Mexico and the results of a questionnaire that had been sent to consular officers. Although responses to the questionnaire were reported, there is no indication of the number or the extent of responses.

[258] Federal Bar Association Seminar (May 19-20, 1988), *supra* note 79.

[259] The author sought specific guidance on the following issues, most of which arose from an AILA study, Paparelli & Tilner, *supra* note 3: the implications for review of a lack of funding for the visa process; the feasibility of reviewing the notes of consular officers which are often hastily

B. General Observations of the Visa Process

Consular officers and their superiors are typically well educated, trained in the visa process, and hard-working. The Foreign Service Institute provides three levels of consular training in the visa process. The Basic Consular Course, for all first-tour officers, takes 26 days, about one-half of which is devoted to visa-related training. Most officers in the consular cone, typically as they come "off-line" into supervisory positions in their third tour of duty, voluntarily attend an Advanced Consular Course. It lasts 3-5 weeks and includes a somewhat heavier concentration of training in visa processing. Finally, the Institute conducts about four overseas, regional workshops to further train and present updated procedures to both consular officers and natinal employees. It is estimated that an average of 60-70 officers attend these workshops each year.[262]

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written under extreme time pressures; the definition of a "genuine stake", to distinguish denial cases meriting review from those not meriting review; the appropriateness and the implications for the national interest of excluding from review certain B-2 and all C and D visa applicants; the national security and foreign policy implication of denying visas to Mexican applicants; the remoteness of a proposed administrative review board in Washington from the consular exposure to local cultures; the efficiency and efficacy of having attorneys present at consular adjudications; the influence of administrative review on the objectivity of consular officers (it is much easier, if not hassle-free, for consular officers to issue visas than to deny them); cost versus benefit for aliens of delays and expenses in the administrative review process, given the opportunities simply to reapply; the alternative of abolishing visas and relying on residence and work permits, departure controls, and other controls of aliens. *See, e.g.*, Telephone interview, *supra* notes 22, 86.

[260] A summary of the author's interviewing in London may be found in Part V, *supra* text in sentences following note 349. Unless otherwise indicated, field notes and specific references to dates and personnel are on file with the author.

[261] H. James, The Art of Fiction (1888)--and "[t]he law is the last result of human wisdom acting upon human experience for the benefit of the public." S. Johnson, *quoted in* 1 Johnsonian Miscellanies 223 (G. Will ed. 1897 & reprint 1966).

[262] Telephone interview with John Ratigan, Director, Consular Training, Foreign Service Institute (Jan. 5, 1989).

On-line officers, usually at lower levels of the diplomatic corps and sometimes referred to affectionately as "munchkins," do not wish nor foresee many years in such work. They do, however, view the work as important, challenging, and without equal as an opportunity for using and developing language and interpersonal skills. Although on-line work is tiring, particularly mornings when adjudications are most apt to take place, morale seems to be quite high.[263] Several officers talked enthusiastically about their work and, during the author's on-line observations, appeared eager to discuss and explain their decisions. It was obvious that they took pride in developing psychological insights about the applicants, in trying to make the process as objective and scientific as possible, and in efficiently reaching decisions.

Officers seemed to comply with Department standards of etiquette.[264] When local authorities complained about one post's "rude" treatment of applicants, the post responded as follows:

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[263] These observations indicate considerable improvement in the ten years since the Study, *supra* note 61, suggested that consular officers were poorly trained, and reported that "[i]n Mexico, most consular officers are disappointed and frustrated with their work," *id.* at 137, and "[o]ur work is a farce. I think the [State] Department realizes this and that's why we don't get promoted, or enough resources, or enough manpower. It's a nothing job." *Id.* at 139.

[264] For example, Department Notes provide the following guidance to consular officers:

> Consular officers should make every effort to conduct visa interviews fairly and sympathetically. Any semblance of cross-examination, assumption of bad faith or entrapment must be avoided.

Foreign Affairs Manual, *supra* note 19, at J-473, N2 (non-immigrants) and J-719, N1 (immigrants).

> (m)Convey Refusal in Sympathetic but Firm Manner--The manner in which visa applications are refused can be very important in relations between the post and the population of the host country. Consular officers must be careful not to appear insensitive.

Id., J-849, PN1.1(m).

> If it appears to the consular officer that the facts involved make eventual issuance unlikely, care should be taken not to encourage the applicant to undertake useless effort and expense to reactivate the case.

Id., J-849, PN1.2.

But see supra text accompanying note 22.

> We do process quickly because we are striving to run an efficient, cordial operation, and we want to allow everyone who shows up at the door, same day access. The fact is that we have many applicants. But we get through our line every day.[265]

This explanation appears to reflect a general practice. The lines of applicants are often formidably long per consular officer. To get through the line, visa sections may do a limited amount of "batching" or group processing of same-class of applications. They may also pre-screen applications, particularly to determine that each applicant understands the basic process and possesses whatever documentation may be required or useful. In London, applications are generally reviewed by mail; a denied applicant may then request an interview, which typically lasts about five minutes. In Mexico City, "rovers" pass through the "barn" of waiting applicants, checking their documentation and dividing them into three groups: the fast lane of applicants who can expect to get visas within one-half hour, those with little or no possibility of success, and the "uncertains," who represent a majority of the applicants. All posts understandably discouraged excessive documentation that might lead to a paper chase. One reviewing officer indicated his preference to rely on oral, rather than written evidence whenever possible because of the greater reliability of personal appearance as opposed to written, often fraudulent, documentation.

The length of applicant interviews among the posts ranged in average length from seven to fifteen minutes for immigrant visas and thirty seconds to eight minutes for nonimmigrant visas. This range can be explained partly on the basis that at the "one-minute posts" the adjudications were primarily of first-timers, whereas at the "eight-minute post" the adjudications were primarily of repeaters or "overcomers." Most of the scores of interviews the author witnessed were handled very efficiently.

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[265] Office of the American Consul General, U.S. Embassy (Warsaw), Issues Affecting Work in Poland 1, August 22, 1988 (on file with author). [hereinafter cited as Issues.]

Although typically separated from each other by partitioned cubicles, on-line officers did not work in a vacuum. Supervising officers were present, making spot checks and monitoring the process. All of the supervising officers had served on-line and seemed to understand the problem of having to make quick decisions about nonimmigrant visa applicants on the basis of often skimpy documentation and nondescript personal appearances.

Consular officers made use of local employees to conduct investigations, including repeated phone calls to verify employment status of applicants for nonimmigrant visas. American nationals other than consular officers also conducted a variety of more official functions. These nationals, often spouses of diplomatic-consular officers, are generally trained on the job. As a cost measure, they conducted the interviewing of most of the applicants for visas under IRCA's Special Agricultural Workers (SAW) program,[266] and handled normal adjudications at another post. The use of these "para-consular assistants," or "mustangs", as they are known, is sometimes controversial. Under the INA and Departmental regulations, only consular officers may issue or refuse visas.[267] Consulates justify this apparent circumvention of regulations by explaining that the chief of the visa section or the responsible officer ultimately stands behind or overrules the decisions, so that the use of para-consular assistants is more of a clerical delegation than a delegation of responsibility. Given the time and budget constraints, however, the decisions by the mustangs can be determinative.

The State Department is also experimenting with the use of Civil Service visa examiners to supplement consular officers in processing immigrant visa applications in Ciudad Juarez, Mexico. The border location enables the State Department to cut costs by hiring bilingual residents of El Paso to commute across the border to do the work.[268]

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[266] Determination of Agricultural Labor Shortages and Admissions of Additional Special Agricultural Workers, INA § 210A, 8 U.S.C. § 1161 (Supp. IV 1986).

[267] INA § 291, 8 U.S.C. § 1361; 22 C.F.R. §§ 40.1 (d) (definition of a "consular officer"), 41.111, 41.121, 42.71, 42.81 (1988). *See also* Study, *supra* note 61, at 98, for a 10-year old comparison of this practice.

[268] State, Dec. 1988, at 9, col. 1.

During adjudications, on-line and supervising officers occasionally consulted the computerized look-out systems, the Foreign Affairs Manual, and other Departmental memos. The officers indicated that the Manual provides essential guidelines, but does not help them with a number of highly discretionary aspects of adjudication. One officer pointed out that she is very much on her own in drawing the proper inferences from the demeanor and other personal clues of applicants. Officers recognized that their decisions were often somewhat subjective and that mistakes were bound to happen.

The situations which may confront a consular officer during an interview are endless. What follows are just a few of the situations the author witnessed. An applicant excessively decked out from head to belt-line and wrist in tacky jewelry: is she perhaps protesting too much about her ostensible wealth or does she just like tacky jewelry? A soccer team, invited to play in a tournament against American teams, consistent with important cultural objectives of U.S. foreign policy: what to do when two members of the team, which had been practicing for a long time together, appeared to be ineligible for nonimmigrant visas? A mother, ill with cancer, sought to visit an only daughter in the United States whom she has not seen in a year, who could not return home easily, and who had access to medical care not available to her mother at home: would the mother ever return if she received a visa?

C. Informal Statistical Analysis

Given the need consular officers have to exercise considerable discretion, it is not surprising that the rates of refusal can vary among consular officers, even at a single post. During a sample day at one post in Mexico, five on-line officers adjudicated 630 nonimmigrant visa applications. Their individual acceptances, rejections and rates of acceptance follow:

Officer	Acceptances	Rejections	Total	Acceptance Rate
1	56	81	137	41%
2	22	80	102	22%
3	90	130	220	41%
4	66	55	121	55%
5	30	20	50	60%
	264	366	630	42%

The nonimmigrant acceptance rates thus varied that day at this one post from a low of 22% to a high of 60%. This reflects just one day at one post. Of interest, nevertheless, is both that the acceptance rates vary considerably among the officers and that the highest rate (60%) was that of the reviewing officer.

Acceptance rates, adjusted to take account of visas eventually issued to initially unsuccessful applicants, vary substantially among consular districts from a high of 99.7% for Mauritania and Naha, Japan down to a range between 48% and 60%, overall, for the high-volume posts in Mexico, China and Poland that the author visited.[269] Among the posts in Mexico, the simple and adjusted rates of acceptance for Mexico City were 81.1% and 84.1%, respectively, whereas in Guadalajara, the rates were 55.6% and 59.4%, respectively. Interestingly, the figures for other posts in Mexico tended to cluster around either the national average or the Guadalajara figure. Each of these figures reflects about the same (3-4%) adjustment to take account of "refusal overcomes", but the acceptance rates otherwise varied dramatically. In Poland the nonimmigrant visa acceptance rates, as follows, were remarkably uniform: 48.4% in Warsaw, 50.5% in Poznan, 50.9% in Krakow.

Also remarkable is that, of the six posts visited, those in Warsaw and Krakow, only a few hours apart, had the most mutually divergent procedures, in the following respects: the required waiting period between time of refusal until eligibility for reconsideration (one year in Warsaw, on appointment in Krakow): the average length of time for an adjudication (2 minutes in Warsaw, 7-8 minutes in Krakow); and pre-screening (none in Warsaw for lack of funding, pre-screening for proper documentation in Krakow). An officer concluded flatly that such inconsistencies among the posts in Poland were "no problem." To a great extent, the uniformity of acceptance rates among the posts confirms her conclusion. The inference is that reasonable variations in procedures do not have much, if any, effect on rates of acceptance for nonimmigrant visas.

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[269] U.S. Department of State, Visa Workload Report for Fiscal Year 1987.

Another inference is that, inasmuch as the rates among the three consulates in Poland are remarkable similar, they tend to verify the average rate for all three of the posts. This is not to say that mistakes do not happen--each of the posts could be making about the same high percentage of mistakes, for example--but the figures do suggest that, using different personnel and procedures, the posts have semi-independently arrived at rates that, because of their similarity, may self-validate whatever processes were used. In Mexico, however, the range of acceptance rates is somewhat more divergent, perhaps because of demographic rather than administrative factors. The more prosperous and "professional" areas (for example, Hermosillo) and Mexico City, where trade and investment representatives and the intelligentsia tend to be concentrated, have higher rates of visa acceptances. Conversely, a higher rate of applications at the other posts came from poor, rural backgrounds. This, however, is all very impressionistic and speculative. More comprehensive figures from the field merit further analysis.

At the Shanghai post a comparison of the issuance rates of F-1 student visas (33% of all applicants) and J-1 exchange visitor visas (8% of all applicants) shows a lopsided discrepancy. The acceptance rate for F-1 visas is 33%, whereas for J-1 visas, the acceptance rate is 90.4%, and the author was told that most of the J-1 refusals (9.6%) eventually would be converted into issuances. What explains this discrepancy? Most students (F-1) are more or less on their own, whereas exchange visitors (J-1) have the endorsement and sometimes sponsorship of Chinese or American institutions, and enjoy a presumption that, unlike students, they are likely to return home before the expiration of their visas. Thus, not surprisingly, rates of acceptance vary substantially among nonimmigrant classes, in China as elsewhere.

D. Review Process

All of the posts unhesitatingly reported that they orally explain the bases for denials to all refused applicants. Generally, all five posts indicated that they received relatively little pressure to reverse visa denials from attorneys or Members of Congress, but tried to respond promptly to them. They acknowledged that letters signed by Members of Congress themselves received particular attention. Although the Mexico City consulate estimated that it received an average of five Congressional inquiries a day, the norm per post seems to be more like one inquiry a week. The posts experience considerably more pressures from American petitioners, sponsors, and other family members. The consulate in Krakow devotes a portion of each Tuesday and Thursday afternoon to interviews with these Americans. The officers attempt to explain the reasons for denials and offer the visitors an opportunity to present new information on behalf of Polish applicants. If a visitor is persuasive, the consulate may agree to reconsider an application.

"Refusal overcomes" were treated routinely and taken seriously at all posts the author visited. One reviewing officer reported that interviews on reconsideration of immigrant denials and "overcome" attempts by immigrant and nonimmigrant applicants were never limited in time, even at his very busy post. In Warsaw the United States Ambassador reported that applicants who had been denied B-2 (tourist) visas and were encouraged to reapply for work-related visas seldom did so.[270] It was unclear to the consular officers concerned why refused applicants did not avail themselves of this opportunity, but experience in Warsaw suggests the need for requiring refused applicants to exhaust reasonable alternatives proposed by the refusing consulates before being allowed the benefit of an appeal outside the visa section.

All four visa refusals that the author monitored were later reversed by reviewing officers. Three of these refusals, under INA § 214(b), were reversed after oral clarification of factors that had been misinterpreted to indicate the applicant's probable intent to depart the United States prior to expiration of the visa. One of the cases involved a second personal appearance by the applicant. The fourth refusal, under INA § 221(g), was reversed on production of further documentation pertaining to the applicant's financial circumstances. The author's limited experience is certainly not definitive, but does tend to show the efficacy of the internal review process in consulates.

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[270] "Opinions", Polityka, Warsaw, Aug. 20, 1988, *translated in* Issues, *supra* note 265.

[271] Bernsen, supra note 240, at 380-90.

Consular officers generally appear to avail themselves of the review process in the Visa Office only when required. Few consular officers viewed the Visa Office favorably; several objected to the inferior quality of regulations and dispatches prepared by the Office. Visa Office routing seems to be largely off the consular road map. On the other hand, consulates seem to take the required process of internal review seriously, contrary to the contention that the process is subjective, disingenuous or sloppy simply because reviewing officers depend on the same on-line officers whose denials they review, and with whom they otherwise have to live and work in often isolated circumstances.[271]

Lack of funding creates personnel shortages that may require a supervising officer to go on-line and therefore sacrifice time otherwise available for the prescribed review. There is often time for only spot-checking, at best. At two of the posts visited, the internal review of denials has therefore been accelerated, allowing the supervising officer time to ponder only a random sample of each on-line officer's daily set of refusals. One senior officer indicated a need for clearer, uniform standards for internal review.

None of the officers was enthusiastic about the prospect of more formal processes of administrative and judicial review. One officer concluded that "external review" would not be "feasible". Another officer considered more formal review to be potentially "unwieldy." One officer, emphasizing the effect more formal review of nonimmigrant refusals might have on the morale and work attitudes of on-line officers, stated that it "would turn the junior officer corps into a corps of deponents." The same officer did, however, acknowledge that more formal administrative and judicial review of *immigrant* visa denials might be feasible. Such review would be "cut-and-dried" and "probably not a huge burden on the government or taxpayers," although provision for such review would first need to resolve some thorny issues, such as who would be entitled to review and whether foreign applicants would have standing in court.

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[271] Bernsen, supra note 240, at 380-90.

E. Past, Present and Future

Ten years ago, a study of consular discretion concluded that "[b]y and large, most officers perform well under difficult circumstances. If officers misapply the law, it may be because no one corrects their errors."[272] The study made a number of recommendations, centering on improvements in management accountability. What was evident then is evident today, although the suggestion that errors occur because "no one" is available to correct them is questionable. In sum, consular exercise of discretion, within the time constraints, appeared to be intelligent, informed and fairly well-structured and confined.

The internal review process is apparently a good deal better today than it was ten years ago,[273] but there is room for improvement. Regulations and other dispatches prepared by the Visa Office need to be improved so as to offer better guidance to consular posts. More expanded external review, beyond Visa Office opinions, waivers of eligibility by the Secretary of State, and very limited judicial review, seems advisable. The benefit would not be the avoidance of all error nor necessarily a more efficient visa process. Instead, the benefit would be to improve the capacity of the process to overcome the three most unfortunate consequences of non-review or only perfunctory review: mistakes; the appearance of a form of "consular absolutism" that is hard to justify; and a frustration of uniform decision-making among the consulates, that is, of responding to similarly situated applicants in essentially the same way.[274] From the viewpoint of the Bar:

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[272] Study, *supra* note 61, at 160.

[273] Note, for example, the following observations:

> Yet, this Study indicates that Departmental guidelines are often vague and ill-defined. Different consular officers and consulates interpret the law, the regulations, and the guidelines in vastly dissimilar ways. Indeed, two officers may reach opposite determinations on the same question of fact and law. The system of checking these determinations is inadequate to ensure the uniform application of the law. Review at the post is often cursory and sometimes deferred. Visa refusals occasionally pass completely unchecked. Aliens who are refused visas have little recourse.

Id. at 152.

> most consular officers are undoubtedly honorable and well-intentioned. Honor and good intentions, however, are small consolation to the alien who is mistakenly refused a visa, and to the United States citizens, residents, and entities who depend on the alien's admission. Despite a genuine need, or even a statutory entitlement, to be admitted to the United States, the alien who is denied a visa is left remediless in the face of mistaken or unlawful action by a consular official.[275]

Not only the applicants, but the visa sections, too, would benefit from a strengthened review process. Even the most competent, well-disposed consular officers might benefit from further guidance and a "second opinion."

It does not seem advisable, however, to provide for more extensive review, whether internal or external, without considering the cost of increased consular staffing. Funding would help provide more time and resources for internal review by supervisers, making the daily, on-line routine more manageable and less hectic for consular officers and minimizing the need for external review.

V. Alternatives

What is to be done? Analysis thus far indicates that there is room for improving the process for reviewing visa denials by consular officers. Although the process today works reasonably well, it does not fully satisfy any of the three basic values of review, namely, accountability, uniformity or consistency, and due process. This Part first considers the possibility of relying on jurisprudential developments, then considers other alternatives for improving both informal and formal stages of the review process, and concludes with a brief caveat about four uncertainties along the path to reform. These uncertainties are the pace and extent of jurisprudential developments; more adequate funding of visa sections and the review process; the political feasibility of expanding administrative and judicial review; and statutory drafting skill.

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[274] Developments, *supra* note 84, at 1361.

[275] Paparelli & Tilner, *supra* note 3, at 1033.

A. Jurisprudential Developments

1. The International Legal Framework

Courts could extend the review process along a number of different lines. The first might be to establish expectations about consular discretion more squarely within the framework of international custom. The basic rule of international law, which as custom is "part of our law,"[276] establishes a qualified duty to admit aliens. Accordingly, the government may exclude aliens only if, individually or collectively, they pose serious danger to public safety, security, general welfare, or essential institutions.[277] Although this rule does not prescribe specific national means of implementation, justiciability, or enforceability by individuals, it is nevertheless significant, for it encourages states to define a proper margin of responsibility, in cooperation with other states and out of obligation to the global community. It also eliminates endless semantic debate about whether entry is a right or a privilege (to the extent that this distinction is valid anymore, entry is a qualified right), whether constitutional protections extend extraterritorially (they do insofar as consular decisions are subject to the rule), or whether Congress has plenary power, inherent in sovereignty, to exclude aliens without judicial intervention (it does not). In short, the international legal rule helps bring the judiciary out of the "cataleptic trance" that the "mere mention" of the word "immigration" induces.[278]

Acknowledgement of a state's qualified duty to admit aliens may seem radical because it challenges the easy assumption that states may do as they please, but the rule is really quite modest. It is generally reflected in United States practice under the INA's immigrant preference quotas and would not necessarily result in an expanded issuance of nonimmigrant visas. Thus, the rule's cutting edge will not be useful in demolishing immigration controls or even in tearing a hole in the nylon, tortilla and other curtains at the border. Instead, its cutting edge opens up a greater awareness of responsibility and sense of human solidarity, and offers Members of Congress and consular officers alike a tool for further standardizing the eligibility of aliens to receive visas. The rule will also assist consular officers in individual cases to avoid excessively subjective determinations of ineligibility, particularly in examining and reviewing applications for nonimmigrant visas. That may be easier said than done, but it is incumbent on decision-makers to apply the rule.

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[276] The Paquete Habana, 175 U.S. 677, 715 (1900).

[277] *See supra* text accompanying notes 174-78.

[278] Legomsky, *supra* note 166, at 306.

2. The Appropriate Standard of Judicial Review

In the words of the Supreme Court, all administrative adjudications are "to some degree judicial and to some degree political"[279] and immigration issues can be especially foreign policy-sensitive. It is clear, therefore, that the courts can and should be expected to defer to some extent to the political branches, in terms of both the INA and the exercise of consular discretion under the INA. Deference, however, is a matter of degree. In reviewing consular discretion, the appropriate level of deference can be expressed in the standard for review, rather than in a rule of nonreviewability that is unnecessary and difficult to justify.

a. The *Mandel* Test

The intended scope of the *Mandel* test of a "facially legitimate and bona fide reason" is anything but clear.[280] It could be narrowly limited, on the one hand, to waiver cases raising First Amendment issues under INA § 212(a)(28),[281] or it could be more broadly applied to all visa denial cases involving Congressional delegation of a "conditional exercise of [the power to exclude] to the Executive."[282] Assuming a broad scope, the depth of judicial scrutiny is subject to two interpretations. According to the "superficial" test, courts would defer to consular discretion so long as a result appeared to be facially rational, that is, so long as the reasons stated for the denial on the Visa Control Card (1OF-224B) bore a "reasonable relation to a proper legislative purpose [as expressed in the INA]."[283] According to this interpretation, a mere citation of the grounds for exclusion, such as "§ 214(b)" or "§ 221 (g)," on the Visa Control Card would be sufficient to avert court review. On the other hand, an irrational notation such as "applicant has a punk hairdo" would not in itself be sufficient.

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[279] INS v. Abudu, 108 S. Ct. 904, 914 (1988).

[280] Shapiro, *supra* note 4, at 936; *supra* text accompanying notes 135-139.

[281] 8 U.S.C. § 1182 (a)(28).

There are, however, several problems with such a *de minimis* reading of the *Mandel* test. First, the Department of State itself requires greater elaboration of the grounds for exclusion. In addition to noting the applicable INA section on the Visa Control Card, consular officers must "[i]nform the alien orally of the provision(s) of law on which the refusal is based and of any exception provided by law under which administrative relief is available".[284] The officer must also furnish a refused alien with a written explanation of the refusal, "explaining the ground(s) of ineligibility and the steps, if any, which may be taken to overcome the refusal."[285] Further, "[t]he explanation should be complete and set forth the facts which led the consular officer to determine that the cited section(s) apply to the applicant's case."[286] A denial under INA § 221 (g) on the basis of insufficient documentation therefore requires a precise identification of the missing documents.[287]

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[282] 408 U.S. at 770.

[283] Nebbia v. New York, 291 U.S. 502, 537 (1934) (the rational basis test of constitutionality).

[284] Foreign Affairs Manual, *supra* note 19, at J-846, PN.1,1 (a).

[285] *Id.* at J-847, PN 1.1 (b)

[286] *Id.*

[287] *Id.*

A second problem with a *de minimis* reading of the *Mandel* test is that the *Mandel* Court seems to have upheld the denial of a waiver of ineligibility because of a specific, Departmental finding that the applicant had violated the terms of earlier visas issued to him.[288] In light of this finding, *Mandel* can be viewed as a rather innocuous decision. Finally, a superficial test of reviewability would be wholly inadequate--it would amount to nothing at all--in the majority of nonimmigrant visa denials that rely on one of the catch-all grounds--for example, §§ 214(b) and 221(g)--that are hardly descriptive. Thus, the *Mandel* test seems to prescribe a more than superficial scrutiny of the exercise of consular discretion, as subsequent decisions suggest. At the very least, there does seem to be "a growing judicial consensus that visa denials based on an applicant's political views are not 'legitimate' or 'bona fide' within a system of true expression."[289]

A preferred interpretation of the *Mandel* test would therefore seem to require deeper scrutiny by the courts.[290] To be sure, the term "facially" would seem to constrain the courts from assessing the wisdom or advisability of a denial.[291] For example, a consular officer need not justify an exclusion on the basis that the applicant "has too few assets" to avoid the likelihood of becoming a public charge after entry. On review by the courts, a finding that the applicant was a model human being, worked hard and always turned over his earnings to his spouse would be irrelevant, as would a finding that, in fact, an applicant could quickly overcome his impoverished condition.

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[288] 408 U.S. at 758-59, 769.

[289] Shapiro, *supra* note 4, at 938.

[290] *See* Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985), *aff'd*, 845 F.2d 1111 (1st Cir. 1988). Whether a plaintiff loses on the merits according to a super-ficial standard or because the courts deny jurisdiction according to the plenary power doctrine might not seem to make any difference to a losing plaintiff. It may, however, "make some difference to the ultimate development of a sound body of law." T. A. Aleinikoff & D. Martin, supra note 2, at 209.

[291] *See* Comment, *Immigration and the First Amendment*, *supra* note 4, at 1906.

To be "legitimate," the stated reason for a denial need only be within a margin of discretion under statutory, constitutional and international law. This requirement would seem to overlap the "abuse of discretion" standard. As a basis for determining "legitimacy," the "qualified duty" rule of international law could be more precisely expressed in legislation, by establishing acceptable levels of migration to the United States and absorptive capacity of the country, and by providing for modification of those levels under certain circumstances. Accordingly, an alien could be excluded, for example, if visa overstayers had become a serious problem, or the country had reached its absorptive capacity of temporary workers, or the number of elderly and infirm was beginning to strain national health and welfare support systems.

The "bona fide" requirement, to whatever extent it is independently significant, would seem to call into question only stated reasons that appeared on their face to be disingenuous, vindictive, or the like.

In sum, the *Mandel* test, if applied broadly--and that may not have been intended--can nevertheless be construed to comport, at least minimally, with both the "rational basis" test for testing the constitutionality of legislation and the "abuse of discretion" test for judicial review under the APA. It would be preferable, however, to limit *Mandel* narrowly to a particular class of waiver denials, or, better yet, to relegate the text to the dustbin of ambiguous aberrations in the case law.

b. Alternative Standards

Although consular officers are required to explain their reason(s) for applying a particular ground for exclusion, some grounds for exclusion are understandably so broad and dependent on quick judgments by consular officers that an appropriate standard of review must defer to some extent to consular discretion.[292] With respect to a few grounds it might even be appropriate to apply a wholly deferential standard of review. For example, in a few cases the exigencies of foreign policy or national security might on their facts require courts to apply the political question doctrine. Most issues of review and reviewability, however, arise out of consular determinations under open-textured provisions of the law, that is, provisions that require the exercise of substantial discretion. There is, thus, a need for a standard of review that requires a rational relationship between a determination and evidence of ineligibility in the form of stated facts.

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[292] The United States Commission on Civil Rights, The Tarnished Golden Door: Civil Rights Issues in Immigration 48, text at n. 20 (1980) [hereinafter cited as The Tarnished Golden Door].

The most obvious alternative for reviewing consular *discretion* would seem to be the APA § 706 standard of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." On review of a consular denial, a federal court could find an abuse of discretion, for example, if there is no evidence to support the decision or if its interpretation of the law appears to be improper or incorrect.[293] Similarly, courts have found abuse of discretion in other immigration contexts when an official failed to exercise discretion at all, provide reasons for a decision, ignored relevant considerations, or departed inexplicably from normal policies.[294]

3. Standing to Complain

The law of standing cannot be made easy. It is as complex and varied as the law of who may sue to remedy what wrongs across the entire domain of law. Questions of who may sue in various settings share certain common characteristics. But to think, or pretend, that a single law of standing can be applied uniformly to all causes of action is to produce confusion, intellectual dishonesty, and chaos.[295]

Developing a substantive framework of law and standards for review will be of only limited help to a refused applicant in the absence of standing to compel review. A difficult problem is that applicants denied a visa are by that fact unable physically to bring an action in the United States.

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[293] *See, e.g.*, Song Jook Suh v. Rosenberg, 437 F.2d 1098, 1102 (9th Cir. 1971).

[294] Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 Minn. L. Rev. 1205, 1212 (1989).

[295] Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 290 (1988).

In interpreting the APA, the courts have fashioned rules that would seem to provide limited standing to American citizens, at least, to complain of injury to them resulting from denial of a visa to an alien. In *Association of Data Processing Service Organizations, Inc., V. Camp*,[296] the Supreme Court applied the APA's § 702 to establish that persons have standing if they are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question"[297] and if they have suffered "injury in fact."[298] Standing, therefore, is no longer limited to those who claim an injury to legal rights; all that is required is a showing of some kind of injury *in fact*, which can be either economic or otherwise. Any American, at least, who has a strong enough relationship with an alien to file a petition for an immigrant visa on the alien's behalf would seem to be entitled to standing. Thus, all applicants for the first six preference categories would seem to be indirectly protected by at least a limited judicial reviewability of the petition filed on their behalf. The only exception among immigrant visa categories would be the seventh, non-preference category, which is insignificant because the first six categories have been and will remain oversubscribed indefinitely into the future. In nonimmigrant cases, the post-*Mandel* line of First Amendment-related decisions provides for limited standing of American citizens--relatives, prospective or actual employer, educational institution, and so on--to complain on behalf of foreign applicants. Beyond such vicarious standing, the road to the courtroom is poorly charted.

Although non-resident aliens can bring legal action in federal and state courts, that capacity is meaningless if they are unable to obtain a visa to enter the country. The rules of standing do not explicitly protect the rights of aliens to complain about visa denials effected abroad, although *Mandel* itself and a few other cases have tacitly allowed standing to non-resident aliens, at least as symbolic parties. Archaic notions that they possess only a privilege and not a right to a visa and that constitutional protections do not extend abroad, have made the courts reluctant to allow aliens standing to complain about visa denials. There has also been a fear of opening the floodgates to litigation if applicants were given standing to sue in such cases. These considerations help explain why the limited jurisprudence generally denies standing in visa denial cases unless the applicant can show a strong affiliating circumstance with the United States, such as recent residence in this country,[299] or membership in a class of primarily resident plaintiffs.[300] In demonstrating the requisite connection with the United States, applicants for immigrant visas are apt to have an easier time than applicants for nonimmigrant visas.[301] Indeed, the INA's preference system for intending immigrants is based on connections that would also provide a fair and reasonable basis for standing, namely, on family reunification and the interests of American employers in foreign labor.

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[296] 397 U.S. 150 (1970).

[297] *Id.* at 153.

[298] 397 U.S. at 152; *accord*, Abourezk v. Reagan, 785 F.2d. 1043, 1050 (1986), *aff'd per curiam*, 108 S.Ct. 252 (1987).

Mendelsohn v. Meese,[302] which is one of two companion cases concerning the status of the PLO Mission to the United Nations,[303] shifts the analysis of standing in a manner that is relevant to this study. In *Mendelsohn* the court inquired whether United States citizens had standing to challenge the constitutionality of the Anti-Terrorism Act, which, they complained, by requiring the closing of the PLO's Permanent Observer Mission to the United Nations, would deny them First Amendment liberties to engage in effective advocacy of PLO positions and interests.

The court explicitly found the "findings of standing"[304] in *Allende* and *Abourezk* to be "unpersuasive"[305] in the case before it. In those cases, the court explained, the excluded aliens "had a personal stake in the outcome of the litigation."[306] This dictum provides a firm basis for granting standing to any non-resident alien who can show injury in fact, resulting from denial of a visa by a consular officer. In *Mendelsohn*, by contrast, the court decided that the advocates themselves had standing, but not those whose only interest in the litigation involved their alleged "listening" rights under the First Amendment.[307] The court interpreted *Mandel* to limit standing to plaintiffs who would be deprived of the "particular qualities inherent in sustained, face-to-face debate, discussion and questioning...The fact that a person has a First Amendment interest does not require a finding that he has standing."[308] Thus, the standing issue called for a determination not of whether the plaintiffs' "own rights to free speech are violated," but whether "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."[309] *Mendelsohn*, therefore, would seem to shift the *Mandel* analysis of standing away from a focus on vicarious injury to residents to the more immediate injury to alien applicants. Arguably, the effect of this shift could be to undermine the standing of citizens and resident aliens to complain, without establishing the standing of foreign applicants to bring an action themselves. This interpretation of the opinion, however, seems misplaced. First, the opinion acknowledges that even affected "listeners" (or, analogously, Americans deprived of the presence of aliens in exclusion cases) *might have* a "personal stake" in litigation sufficient to be entitled to standing.[310] Second, the court acknowledged that the non-resident aliens denied a visa in *Allende* and *Abourezk*, and hence others denied visas, *did* have standing by virtue of injury resulting directly from the denial.

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[299] *See, e.g.*, Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961).

[300] *See* Kleindienst v. Mandel, 408 U.S. 753 (1972)(by implication); Silva v. Bell, 605 F.2d 978 (7th Cir. 1979); Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985), *aff'd*, 845 F.2d 1111 (1st Cir. 1988) (non-resident alien was a "symbolic party," *id.* at 114, n. 4).

[301] Note, *supra* note 121, at 1154-55.

[302] 695 F. Supp. 1474 (S.D.N.Y. 1988).

[303] *See supra* notes 198-99.

[304] 695 F. Supp. at 1479, n.5.

[305] *Id.*

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[306] *Id.*

[307] *Id.* at 1478-79.

[308] *Id.* quoting Kleindienst v. Mandel, 408 U.S. at 765.

[309] *Id.* at 1479 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)).

[310] *Id.* at 1479.

This requirement of a "personal stake in the litigation" is consistent with APA § 702. In one or another form, the requirement might be implanted. Otherwise, the road to the courtroom, to whatever extent it has been charted, will remain overgrown with tangled precedent. The "injury in fact" test is difficult, if not impossible, to apply objectively,[311] and other very generalized rules of standing are likewise misleading or obfuscating.

In the absence of constitutional authority on the issue of standing in visa denial cases, the best solution is statutory and regulatory clarification.[312] A straightforward, statutory approach to standing would then bring the analysis full-circle to the jurisprudential reality of the plenary power doctrine, the "political question" doctrine, visas-as-privileges-not-rights, and the non-applicability of constitutional protection to non-resident aliens. The current articulation of these constraints is in part the product of the questionable common-law structure of standing, and since the constraints have no clear constitutional justification, Congress, if it wants, can enact legislation to overcome them and to provide for standing. Proposed "Immigration Exclusion and Deportation Amendments of 1987" would have provided standing to specific classes of plaintiffs in visa denial cases, based on national security grounds. Any U.S. citizen or permanent resident alien would have had standing in a federal district court "who intends to meet in person with, or hear in person, an alien," who has been denied that opportunity because an alien has been denied a visa.[313]

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[311] Fletcher, *supra* note 295, at 231.

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> I do not suggest that standing decisions will become easy or noncontroversial if the suggestions made here are followed . Many will remain highly controversial, for they are often critically important decisions about which there is and sometimes can be no complete agreement. But the argument will be focused, as it should be, on the particular statutory or constitutional provision at issue. If the general structure of standing law is seen in the way suggested here, the confusion and obfuscation that have haunted standing law for the past several decades will diminish and, in time, may subside to the amount inescapably present in a legal system that makes significant changes through its judiciary.

Id. at 291.

B. Internal Procedures for Review

Besides a reliance on jurisprudential developments, what other avenues are available for extending review of consular discretion? Bureaucratic justice, reliant on discretion, may sometimes be preferable to a review process that relies on more formal procedures. Current evidence indicates that visa sections of consulates and embassies conform to a bureaucratic model of administrative justice.[314] The consular process seemed to be active, investigatory, generally attuned and generally responsive to conflicting values, and accuracy-oriented. Although consular officers seek a rational basis for their determinations, however, their exercise of discretion inevitably relies to some degree on intuition, common sense and sheer experience, and mistakes can happen.

The President's Select Commission on Immigration and Refugee Policy, finding deficiencies in the present system of reviewing consular discretion, recommended improvements in the internal review process rather than establishment of a new administrative body within the Department.[315] The Commission also recommended increased review by the Department of those consular operations that elicited frequent complaints or appeared to depart from established policy.[316] Thus, the Department recommended a strengthening of limited internal and external checks on consular discretion. All denials should be carefully reviewed by a supervising officer. Part IV of this study confirms the advisability of doing so.

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[313] H.R. 1119, 100th Cong., 1st Sess. § 2(b) (1987).

[314] *See* J. Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims 171-72 (1983).

[315] U.S. Select Commission on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest: Final Report and Recommendations 255 (1981) [hereinafter cited as Report of the Select Commission].

[316] *Id.*

As a further check on the process, the State Department might establish regulations or other minimum requirements for access by attorneys at each stage of decision-making. The requirements should also provide for prompt response by the posts to communications from attorneys, and for some means of ensuring that attorneys and their client-applicants can conveniently meet on-site with each other. There is a need for greater uniformity of practice among the consulates.

C. External Administrative Review (Outside the Refusing Visa Section)

There is no bright line between administrative and judicial review.[317] They should be viewed together. Constituent parts of the review system are not only "incredibly complex," in the words of a veteran immigration judge,[318] but inter-related. Greater access to external administrative review can deter more disruptive, time-consuming and expensive review by the courts, and a proven track record of administrative competence can eventually encourage the courts to defer to bureaucratic justice, not because of some transcendental construct of plenary legislative power or because the slate on the issue of reviewability is not clean, but because of judicial confidence in the administrative process.[319] Judicial review should require an exhaustion of administrative remedies.

INA § 104(a)[320] has been interpreted to bar administrative review outside the visa section of an embassy or consulate and has thereby forestalled proposals to create a board within the Department to review visa denials. Nevertheless, the Visa Office, with its advisory opinions, and the Secretary of State, with his waiver authority,[321] do, in fact, become involved. Eliminating this provision in §104(a) would not seem to be a very radical next step. More problematic is the design of an effective and efficient process of external administrative review.

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[317] Legomsky, *supra* note 238, at 1299.

[318] Address by William R. Robie, Chief Immigration Judge, U.S. Department of Justice, Federal Bar Association Seminar, *supra* note 79.

[319] Verkuil, *supra* note 10, at 1206.

[320] 8 U.S.C. § 1104(a). *See* discussion, *supra* text accompanying notes 58-60.

[321] *E.q.* 22 C.F.R. § 41.2 (1988).

One alternative would be substantially to expand the role of the Visa Office. It issues only a modest number of Advisory Opinions, binding as to questions of law but not as to questions of fact. Although a consular officer is quite likely to be the best judge of the facts, there would seem to be a need for some means of strongly discouraging abuse of discretion and patterns of mistakes, at least. There might also be some means of providing for greater uniformity or consistency of determinations among officers within a single visa section of a consulate and among different consulates.

Alternatives available to the Visa Office include further refinement of Departmental regulations and the guidelines found in the Foreign Service Manual;[322] closer monitoring of visa denials and review of field office operations and practices, as recommended by the President's Select Commission on Immigration and Refugee Policy;[323] and substantially greater use of its authority to request refusal reports from embassies and consulates.[324]

Although the Visa Office flatly opposes any proposals for administrative or judicial review,[325] some form of review seems inevitable. As a start, the Visa Office might be directed to randomly sample denials, with an eye toward identifying significant departures from normal interpretations and exercise of discretion. Perhaps, too, the Department might experiment with volume thresholds, according to which a below-average volume of requests for Advisory Opinions from a particular consulate would trigger a requirement that the particular consulate forward on all, or a random sample of the next batch of denials. The Visa Office would then issue opinions on all of these. In view of the probability of an increased workload, it might be advisable to continue binding consular officers only on opinions of law. Finally, the Visa Office might intensify efforts to collect cases from the field, in order to issue further guidance and generally develop more uniform or consistent exercise of discretion among consulates. The Visa Office might select particularly troublesome issues, resulting in divergent determinations, for particular attention.[326] Sections 214(b) and 221(g) of the INA commend themselves for such special attention. Above all, the Visa Office should be encouraged to abandon its obdurate refusal to support or even consider proposals for administrative or judicial review.

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[322] For historical perspective on these efforts, *see* The Tarnished Golden Door, *supra* note 292, at 48.

[323] *See* Report of the Select Commission, *supra* note 315, at 255.

[324] *See* 22 C.F.R. §§ 41.121(d), 42.81(d) (1988).

[325] *See* The Tarnished Golden Door, *supra* note 292, at 48. Cornelius D. Scully III, Head of the Office of Legislation, Regulations and Advisory Assistance in the State Department's Bureau of Consular Affairs, reiterated this opposition to any proposals for review. Telephone interviews with Cornelius D. Scully (April 5, 11, 1989).

The cloak of confidentiality might be lifted from Advisory Opinions.[327] Although the exemption to protect the national defense or foreign policy might remain,[328] applicants otherwise--that is, in most cases--ought to have immediate access to Advisory Opinions as soon as the Visa Office has issued them.

Another alternative would be to establish a centralized Visa Review Board within the State Department.[329] As precedent, proposals to establish such a board typically cite a two-member Board of Appeals on Visa Cases during World War II. That Board is reported to have handled 22,622 appeals in less than four years of operations and overturned 26% of the visa denials it reviewed.[330] How much time did that afford for each case? On the assumption of 250 workdays per year per officer, each enjoying a two-week vacation, and seven hours a day to devote to the cases, the Board had 14,000 hours at its disposal to review and write up decisions, or about 38 minutes per case, going non-stop. That would clearly be inadequate by a factor of at least 5-10, for a peacetime board.

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[326] *See* Study, *supra* note 61, at 158.

[327] *See supra* text accompanying note 250.

[328] 5 U.S.C. § 552(b)(1)(A).

[329] The first Board of Visa Appeals was apparently proposed in 1952 in congressional debate about the McCarran - Walter Act. *See* Study, *supra* note 61, at 158, n. 462.

[330] 133 Cong. Rec. E2211 (daily ed. June 2, 1987) (statement of Rep. Gonzalez).

As the British experience suggests, however, the volume of appeals of visa denials might be small.[331] As assurance, some proposals would limit reviewability to denials of only certain classes of visas. One alternative would be to begin by drawing a line between immigrant visas issued under the preference categories and nonimmigrant visas. Presumably the family and employment interests expressed in the preference categories establish heightened individual interests, closer affiliations with the United States, and hence greater governmental interests in issuing a visa.

Distinguishing among classes of nonimmigrant visas would present difficult problems. To the extent that distinctions would be drawn, not on the basis of the nature of the right, but rather the government's foreign affairs interest, more or less, in a particular case or category of cases, such proposals are consistent with the current ideology of reviewability. It is uncertain, however, what might constitute a strong enough governmental interest to immunize one particular class or category of visa denials, but not another. What about B-2 visas? Would the government's express economic and cultural interest in promoting tourism insulate B-2 visa denials from review? Would denial of a visa to a person dying of cancer to enable her to visit Disneyland be reviewable, but not a young person's desire to travel around the United States on vacation?

What about the ideological/non-security grounds for exclusion? One might think that cases of denials premised on those grounds should be the most immune from review. Ironically, however, it is the very sensitive ideological/national security-oriented denials under INA §§ 212 (a)(27)(28) and (29[332] that in recent years have tended to wind up in the courts because of volatile First Amendment issues. Indeed, the proposed Immigration Exclusion and Deportation Amendments of 1987 would have singled out national security-based denials for judicial review.[333] Clearly, the individual's interest must be balanced against the government's,[334] but that is easier said than done.

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[331] On the British experience, *see* UKIAS Report, *supra* note 87, at 2; on the United States experience, *see supra* text accompanying notes 237-38.

[332] 8 U.S.C. § 1182 (a)(27),(28),(29).

One proposal would have created an independent United States Immigration Board, whose final decisions would have been binding on "all administrative law judges, immigration officials, and consular officials."[335] Another proposal, the Gonzalez Bill,[336] would have created a Visa Review Board within the State Department. The Board would have been available to review visa denials of all special immigrants, immediate relatives, preference category aliens, and the following classes of nonimmigrants: those seeking to reenter with an F,J, or M visa and those seeking to enter or reenter with an E-2, H, K, or L visa.[337] Under the Bill, the Board would have had the authority to overrule a visa denial and require the issuing officer promptly to issue the visa.[338] The Bill might be a good point of departure for establishing a visa review board within the Department. Its somewhat narrow definition of the scope of review over nonimmigrant visa denials might seem somewhat arbitrary, but a cautionary, selective approach of this sort offers a basic orientation for exploring uncharted territory.

Perhaps the place to begin would be a pilot program involving a single class or two of nonimmigrant visas. The "E" class of treaty traders (E-1) and investors (E-2) might be optimum because of a low volume of applicants, the economic importance of the visas, and the technical difficulty of interpreting and applying the law.

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[333] H.R. 1119, 100th Cong., 1st Sess., § 2(b)(1987).

[334] *See* Verkuil, supra note 10, at 1149.

[335] Immigration Reform and Control Act of 1983, S. 259 and H.R. 1510, 98th Cong., 1st Sess. §122a (1983).

[336] H.R. 2567, 100th Cong., 1st Sess. (1987). Appendix E reproduces a copy of the bill.

[337] *Id.* at § (a)(4). For an explanation of the visa symbols, *see* Appendix B.

[338] *Id.* at § (d)(2).

Section (e) of the Gonzalez Bill contains an escape clause that would enable any member of the Board, official, or employee of the federal government, to refuse to disclose confidential information which "would be prejudicial to the public interest, safety or security." This clause might swallow the review process. Moreover, it might enable consular officers to reverse the presumption under international law that admissions will be normal *unless* the requisite threat is apparent. Instead of having to identify a threat to the nation in a particular case, a consular officer would have a very wide margin of discretion to insulate his denials from administrative review.

Any administrative review board should seek to maximize the three values of accountability of consular officers, uniformity or consistency of determinations among officers and visa sections, and due process for applicants and petitioners. The British experience in allowing appeals of visa denials provides one model. The several immigration-related boards within the United States Departments of Justice and Labor offer various models of formality and procedural technicality (see Appendix F).

Mathews v. Eldridge[339] established that the sufficiency of procedures under the Due Process Clause varies with the circumstances, but that courts must consider the type and magnitude of the individual's interest at stake, the risk of an erroneous deprivation of that interest as a result of a particular procedure, and the burdens and benefits of heightened procedural safeguards. The *Mathews* approach would therefore balance the Government's interest in excluding classes of aliens against a visa applicant's interest in being protected against an erroneous or unfair denial.

Goldberg v. Kelly[340] indicates ten minimum ingredients to satisfy the requirement of a fair hearing, administrative or judicial. The Goldberg menu provides a convenient, though by no means mandatory, list of procedural ingredients for a visa review board: timely and adequate notice; confrontation of adverse witnesses; oral presentation of arguments; oral presentation of evidence; cross-examination of adverse witnesses; disclosure to the claimant of opposing evidence; the right to retain an attorney; a determination on the record of the hearing; a statement of reasons for the determination and an indication of evidence relied on; and an impartial decisionmaker.

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[339] 424 U.S. 319, 334-35 (1976).

[340] 397 U.S. 254 (1970).

A visa review board, following the model of an exclusion hearing, might include all of the above ingredients except an opportunity of cross-examination, confrontation of adverse witnesses and oral argument. Consideration might be given, however, to providing for a well-defined range of interrogatories. Unlike an exclusion hearing, there should be provision for effective notice, but none for cross-examination. In exceptional cases involving sensitive issues of national security significance, confidential material might be presented and reviewed *in camera.* The refused applicant, who by definition could not enter the United States to be present in the proceedings, might be represented by a petitioner, legal counsel or other designated representative. The applicant and local petitioner would be given access to the record of consular adjudication, and the latter could present further oral evidence. The board would render a written decision. The most difficult questions relate not to the scope or procedures of the review process, but the accessibility to the process of different classes of applicants and petitioners on behalf of applicants. A first step might be a pilot review process limited to refused applicants for immigrant visas, represented by their petitioners or others, and E-1 or E-2 nonimmigrant visas. If the process seemed to work satisfactorily, it might gradually come to include refused applicants for nonimmigrant visas as well.

D. Judicial Review

From the standpoint of the State Department, a visa section, and individual consular officers, an administrative review board would seem preferable to judicial review. Administrative review may be preferable, too, from a systemic standpoint, so long as the review would "both correct errors in individual cases and enhance quality control of the system generally."[341] Nevertheless, as a last resort, at least to provide for appeal of an appellate administrative decision, judicial review has its place.

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[341] *See* Verkuil, *supra* note 10, at 1182.

The proposed Immigration Exclusion and Deportation Amendments of 1987[342] would have amended INA § 279[343] to provide for the jurisdiction of federal district courts to review visa denials. Venue would have been proper in any court district "in which the individual resides or in which the individual intended [sic] to meet or hear the alien."[344]

Statutory provision for judicial review will need to require exhaustion of administrative remedies, specify the standing of at least limited classes of citizens and permanent resident aliens, confirm the qualified duty to admit aliens, and prescribe a standard for review under APA § 706.[345] On issues of law, the standard should be an independent statutory interpretion. On issues of fact, courts should apply a substantial evidence text,[346] which could be satisfied by reference to the consular's notations and Visa Control Card. Of the options for review of discretion, the fairly conservative "arbitrary, capricious" or "abuse of discretion" standard seems most suitable,[347] given the uncertainties ab initio, the geographical and political peculiarities of consular discretion, and the possibility that merely providing for reviewability would be viewed as a radical enough step for the time being.

If an administrative review board is established and if judicial standing is given to refused applicants, or at least limited classes of them, the preferred route of appeal would seem to be a petition from an adverse ruling of the board to a court of appeals. Otherwise, a denied applicant should be allowed to bring an action directly in federal district court.[348]

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[342] H.R. 1119, 100th Cong., 1st Sess. § 2(b) (1987).

[343] INA § 279, 8 U.S.C. § 1329 (providing for jurisdiction of the federal district courts).

[344] H.R. 1119, *supra* note 342.

[345] 5 U.S.C. § 706 ("Scope of review").

[346] *See, e.q.*, Federal Power Commission v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331 (1976); Jean v. Nelson, 727 F.2d 957, 976-79 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985), Bertrand v. Sava, 684 F.2d 204, 212-13 (2d Cir. 1982); Knoetze v. U.S., 634 F.2d 207 (5th Cir. Unit B Jan. 1981), *cert. denied*, 454 U.S. 823 (1981).

[347] *See* Note, *supra* note 121, at 1168.

E. Other Alternatives

Several other alternatives merit consideration. Although they are not techniques for review, they would serve to limit the need for review. The State Department might consider reallocating consular personnel and adjusting their workload in order to devote more of the Department's limited resources to on-line adjudications where they are most critically needed, more extensive recordkeeping, and more thorough internal review of visa denials. Several changes would make such reallocation feasible within budgetary constraints.

A first change, already in effect, is the pilot visa waiver program.[349] If successful, it might gradually be extended to include both nonimmigrant categories other than short-term tourists and nationals of countries other than those initially selected. The bases for country designations should be both low nonimmigrant visa refusal rates and, secondarily, high volume of visa applications. The author's interviewing at the United States Embassy in London confirms the merits of this program. During the first six months of the program, consular officers issued 140,000 visas in London and 110,000 elsewhere in the United Kingdom, and less than 100 of the tourists were later denied entry by the INS. This low rate of turnarounds suggests that the program relieves consular officers of administrative burdens for visa issuances, without shifting the burden onto the INS. The program has enlisted the cooperation of over 80 major air carriers. Although there have been reports that British tourists under the program have had to wait longer in line for entry at the border or other ports of entry, consular officers respond that the delays are primarily due to longer lines of tourists.

A second change would be to substitute more civil service personnel within commuting distance from consular posts along the border, thereby providing consular officers with more time for record-keeping and internal review of denials. A third change, in order to avoid time wasted on a limited number of cases raising the problem of appropriate venue for visa applications, relates to the problem of "orphan" applications. The State Department might specifically direct all visa-issuing posts to process such applications from third-country nationals, assisted by the advance parole program. Alternatively, the State Department might encourage all posts to process orphan immigrant applications, and specifically designate the following posts: Toronto, Montreal, Vancouver, Tijuana, and Ciudad Juarez. The termination of the Stateside Criteria Program in 1987 has provided consular officers at those posts in particular with more time to devote to third-country applicants.

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[348] *See* Legomsky, *supra* note 238, at 1399.

[349] INA § 217, 8.U.S.C.A § 1187. *See supra* note 13 for a brief description of the program.

Another alternative for reducing the need for review would be to eliminate preference categories for immigrants visas and substitute a point-based system whereby an applicant would receive points for various factors--family relationship with an American citizen or resident alien, employment potential, health, and so on. Those with the highest number of points within a world-wide quota would be given priority to obtain a visa. It is likely that by further detailing, that is, confining consular discretion, a point-based system would help avoid the subjectivity of decision-making that is often the source of pressures for review. Systems of this sort are in effect in Australia and Canada.

A more radical alternative would be to experiment with eliminating nonimmigrant visas altogether (visas would continue to be required for intending immigrants), while continuing to require I-94 forms as a means of monitoring and controlling exits and overstays of aliens. Such a program would eliminate most of the current problems, including the issue of reviewability, but might create new ones. If the rates for any of numerous types of violations--non-return by the time of visa expiration, unauthorized employment, failure to register or re-register, and so on--reached a sufficiently high level, it might be necessary to institute departure controls and work permits. These techniques, and the supervision by law enforcement officials they might require, would, however, raise very troublesome issues of civil liberties. In the past, proposals for permits and national identification cards have not been popular.

A more conservative variation of the "no visa" approach would be to eliminate visas for immigrants and nonimmigrants in each of several categories--investors, fiancés, students, tourists, and so on--up to certain annual levels, at which point visas would be reinstated as a requirement for all nonimmigrants. Up-to-date statistical data could be maintained on the basis of oral inquiries of INS officials at the borders and other ports of entry. These data would, however, be soft because of multi-purpose border crossings, indeterminate purposes for particular crossings or simply mistakes.

F. Uncertainties

The pace of jurisprudential developments is apt to be slow. Funding of consulates has been so limited that training of officers, visa processing, record-keeping suitable for review, and internal review have been understandably restricted. It is highly unlikely that Congress, under continued pressure to reduce budget deficits, would provide the kind of funding that would be needed to overcome these deficiencies quickly, or that it would readily amend the INA to enable the State Department to establish a visa review board. It is also uncertain to what extent Congress would find it politically feasible to provide for appellate administrative or judicial review. Although the Departments of Justice, Labor and State continue to establish new immigration-related boards of review,[350] none would be as ambitious as a review board that would encompass all visa classes. Finally, the capacity of Congress to draft sound legislation to provide for review is uncertain. The gestation period for preparing legislation in a politically acceptable form does not seem to make much difference. On one hand, it took Congress ten years of drafting and redrafting in order to enact the IRCA compromise, whose defects are apparent.[351] On the other hand, it took all too little time for

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[350] These include, for example, the Asylum Policy and Review Unit (Justice), *see* N.Y. Times, Dec. 21, 1988, at A18, col. 1; the Board of Alien Certification Appeals (Labor); the Exchange Visitor Waiver Review Board (State), for aliens with J-1 visas (exchange visitors) who petition for waivers of the two-year home country residence requirement; and the Board of Appellate Review (State), to review loss of nationality and passport determinations. Congress has also provided for review of denials of seasonal agricultural worker status, adjustment of status under IRCA's legalization program, INS determinations of unlawful employment of aliens, and alien claims of discrimination related to IRCA. Paparelli & Tilner, supra note 3, at 1032.

[351] *See, e.q.*, the following conclusion:

Congress to cobble together an unsuccessful revision of the framework for immigrant visas.[352] Taking account of these uncertainties should not deter reform, but rather encourage careful and intelligent planning.

VI. Summary

United States consulates complete the processing of some nine million applications for immigrant and nonimmigrant visas each year. Approximately ninety percent are granted; ten percent are denied. Under current practice, the only official review of a consular official's denial of a visa may be by a more senior officer in the consulate, or on points of law, by the Visa Office in the State Department. The Immigration and Nationality Act has been read to preclude administrative review, and the courts, with a few exceptions, have declined to review visa denials.

Immigrant visas are available to persons with close family relationships to U.S. citizens and residents or with particular abilities or skills that are needed but not

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> The employer sanctions provision of IRCA is a costly one. The cost of the provision in increased employment discrimination far outweighs any minimal deterrent effect that the provision will have on illegal immigration. A society that has made a conscious effort to eliminate race discrimination cannot tolerate such a cost.

Note, *The Effect of Employer Sanctions on Employment Discrimination and Illegal Immigration*, 9 B.C. Third World L. J. 249, 269 (1989). *See also Compromising Immigration Reform: The Creation of a Vulnerable Subclass*, 98 Yale L. J. 409 (1988)(IRCA has created a subclass of undocumented residents who are ineligible for legalization); Kobdish, *The Frank Amendment to the Immigration Reform and Control Act of 1986--A Labyrinth for Labor Law Litigators*, 41 Sw.L.J. 667 (1987)(IRCA's anti-discrimination provisions create a field day for attorneys); Armstrong, *America's Illegal Aliens: They Haven't Gone Home*, Christian Sci. Monitor, Jan. 30, 1989, at 1, col. 3; Howe, *Under the New Law, Illegal Aliens Suffer Much in Silence*, N.Y. Times, Nov. 27, 1988, at 6, col. 1; *Study Hints at Job Discrimination Against Foreign-Looking People*, N.Y. Times, Nov. 20, 1988, at 18, col. 1; Howe, *Study Says Immigration Law is Leading to Discrimination*, N.Y. Times, Nov. 5, 1988, at 1, col. 5.

[352] The bill, S. 2104, easily passed the Senate (88-4), but failed to clear the Judiciary Committee of the House. It was worked out behind closed doors and rushed through the legislative process. The bill appeared to discriminate against some family members and non-English-speaking applicants for immigrant visas. Letters to the author from Sen. Mark O. Hatfield, Minority Chairman, Senate Appropriations Committee, Nov. 23, 1988 and Dec. 1, 1988.

otherwise available in the United States. Nonimmigrant visas are available in a long list of classes, ranging from tourists to students to certain types of business personnel to diplomats.

Whatever the visa category or class, there clearly are important interests at stake. These interests are not just those of the applicants themselves, but also of citizens and residents of the United States who are sponsoring the applicant or have some other interest in the applicant's presence in the United States. The interests of strengthening the global order and upholding rules of international law are also apparent. These interests warrant a close look at the need for fair and efficient review of initial decisions in this important program of mass adjudication.

Federal law and State Department regulations give consular officers substantial discretion in adjudicating visa applications. For example, consular officials exercise absolute discretion in determining whether an applicant may be represented by an attorney or other qualified representative at the visa adjudication interview. Furthermore, although current Department regulations, at 22 C.F.R. § 41.121(c), require that a consular officer's denial of a visa application be reviewed by a more senior officer, budgetary constraints and the high volume of applications at some posts have resulted in review of only a random sample of denials. Intra-consular review may also be a problem in single-officer posts. Consular posts send a few hundred cases a year presenting significant legal issues to the Visa Office of the State Department for an advisory opinion that is binding only with respect to legal issues. The applicant typically has no notice of this proceeding. Such review affects the results in only a small number of cases, since most visa denials are based on a factual determination.

Under customary international law a state may legitimately exclude aliens only if, individually or collectively, they pose a danger to its public safety, security, general welfare or essential institutions. Current law has, however, been interpreted to limit both administrative and judicial review of compliance with this qualified rule of law. Section 104(a) of the INA, 8 U.S.C. § 1104(a), is interpreted to preclude even the Secretary of State from the administration or enforcement of "those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas." This strange provision of the law has thus been read to preclude the establishment of a more formal review mechanism* within the State Department. Further, a number of judicial doctrines of varying current legitimacy have served quite consistently to limit the extent of available judicial review.

VII. Recommendations

Despite the high quality of consular training and decision-making, it is apparent that a more adequate formal review of consular discretion would be beneficial. The availability of such review not only encourages consistency and care in the initial adjudication, but serves interests of fairness and legitimacy. A review scheme can be crafted that would keep procedure to a minimum and that would take account of the high volume of visa applications.

What follows are two, alternative sets of recommendations. The first provides more detailed guidance to the Department of State and Congress, whereas the second defers to a greater extent to their discretion in providing for administrative and judicial review of visa denials.

First, Alternative Set of Recommendations

The following recommendations are based on analysis of alternatives discussed in Parts III and V for improving the process of reviewing visa denials. Of the four uncertainties that were identified in Part V--the pace and extent of jurisprudential developments, the political feasibility of expanding the review process, statutory drafting skill in doing so, and funding -- only the latter has strongly influenced the structure of these recommendations.

A. Under the present level of funding, including inflationary increases, or a modest increase in funding:

1. The State Department should adjust the workload of consular officers, lessening visa processing and increasing record-keeping and internal review of individual cases, as follows:

a. In order to give consular officers more time per case, the State Department should make more use of Civil Service personnel to process visas, at least along the Canadian and Mexican borders, following the example at the consulate in Ciudad Juarez. The latter, who commute daily from the United States, do not require special housing and allowances and typically receive less compensation than consular officers. Appropriate amendments should be made in the Departmental Regulations (for example, 22 C.F.R. §§ 41.121, 42.71, 42.81 (1988)) and the Foreign Affairs Manual to clarify the respective roles of these personnel and the authorizing consular officers who would remain responsible for visa issuances and denials.

b. Having initiated IRCA's Visa Waiver Pilot Program for short-term tourists by designating British and Japanese nationals, the Attorney General and the Secretary of State should move promptly to designate the remaining six countries provided by IRCA. The bases for country designations should be (1) (most importantly) low nonimmigrant visa refusal rates, as prescribed by IRCA; and (2) (secondarily) high volume of visa applications. If necessary, IRCA Regulations should be amended to provide for the latter basis.

c. If, after two years, the Pilot Program is deemed to be successful, Congress should increase the number of designated countries.

d. The State Department should shift some consular offices from posts relieved of responsibilities under the above reforms to other, high-intensity posts. The Department should thereby re-allocate the aggregate activities of consular officers from visa processing to more extensive record keeping of adjudications and internal review of visa denials.

e. The State Department should specifically direct all visa-issuing posts to process "orphan" applications of third-country nationals, assisted by the advance parole program. The Department would thereby give fuller effect to 22 C.F.R. 42.61 (1988) and Foreign Affairs Manual Note, Appendix J-471, N2.1. Alternatively, the State Department should encourage all posts to process orphan immigrant applications, and specifically designate the following posts: Toronto, Montreal, Vancouver, Tijuana, and Ciudad Juarez. The termination of the Stateside Criteria Program in 1987 has provided consular officers at those posts in particular with more time to devote to third-country applicants.

2. Representation: The State Department should adopt a regulation ensuring attorneys meaningful access to the visa process and participation at every stage in it. Providing this check on consular discretion would enhance due process; assist officers by having issues, rules and principles articulated formally; and thereby make the overall visa process more fair and efficient. The Department should gradually adopt uniform rules for increasing accessibility of attorneys, beginning with the following: visa sections should reply promptly to written communications from attorneys, they should provide an area within each visa-issuing consulate or embassy or other nondisruptive arrangements to enable applicants to meet with their attorneys during the adjudication stage of the visa process. The Department should also allow an attorney to meet with the responsible consular officer at least once during the course of a client's involvement in the process and to argue on behalf of the client at that time.

3. The State Department should expand internal review of denials within visa sections.

a. The Department should require consular officers to provide explicit factual and legal bases for denials. Whether the *de minimis* test of a "facially legitimate and bona fide reason" is applicable or not, Departmental guidelines should require more than mere citations of INA provisions, vague references to political considerations, and the like.

b. The Department should ensure that supervising officers review all denials, rather than just a random sample of them, even if it means a backlog of applications. Visa denials at a single-officer post would be reviewed by the Visa Office.

4. The State Department should expand the role of the Visa Office in the review process.

a. The Visa Office should be enabled to require consulates or embassies registering high percentages of complaints, per volume of visa applications, to report to the Office by sending full documentation on all visa denials until the volume of complaints lessens to an acceptable level. The Office should also review those denials for completeness and evidence of reasonableness.

b. The Department should amend its regulations to remove the cloak of confidentiality from most Advisory Opinions. If necessary, Congress should amend INA § 222(f) to provide explicitly for access by applicants and their attorneys to pertinent Advisory Opinions issued by the Office and consular records reviewed by the Office. This amendment would provide that only the FOIA exemption for national defense or foreign policy reasons would bar access to Advisory Opinions.

c. The Visa Office or, if it fails to do so within a reasonable period of time, the General Accounting Office (GAO), should designate one or two major controversial areas of consular discretion--for example, INA §§ 214(b) and 221(g)--for special study. In order to make consular practice more uniform and consistent, the Office would analyze reports of denials based on the areas or statutory provisions selected from at least a sampling of visa sections. On the basis of its analysis, the Office would prepare Advisory Opinions and guidelines for inclusion in the Foreign Affairs Manual.

5. Congress and the State Department should expand the scope of judicial reviewability.

a. Congress should amend INA § 101(a)(7) to make clear that the term "immigration laws" refers to all constitutionally applicable international law, not just treaties and conventions. The Department should amend its regulations to incorporate a reference to the qualified duty of the United States to admit aliens unless they pose serious danger to public safety, security, general welfare or essential institutions of the United States.

b. Congress should amend the INA to provide judicial standing in federal district court, according to the normal rules of jurisdiction and venue, to all U.S. resident petitioners on behalf of immigrant visa applicants, to other U.S. residents either "with a personal stake in the litigation" or under APA § 702, and, as a pilot program, to a single class (such as "E") of nonimmigrant visa applicants.

c. Congress should amend the INA to provide that a court reviewing a visa denial must comply with APA § 706 and adopt the following standards for review: on issues of law--independent statutory and regulatory interpretation; on issues of fact--substantial evidence; on issues of discretion--the "abuse of discretion" standard.

6. Congress should study the feasibility and merits of users fees to finance improvements in the process of visa issuance and review.

B. With a somewhat greater increase in the present level of funding:

1. Congress should establish a visa review board within the Department of State, perhaps independent of the Visa Office. In that connection:

a. Congress should eliminate from INA § 104(a)(1) the following language: "except those powers, duties and functions conferred upon the consular officers relating to the granting or refusal of visas." The result of this amendment would be to enable Congress and the Department to establish a visa review board.

b. Congress and the State Department should use the Gonzalez Bill as a basic framework for the board, but limit review to immigrant visa denials and, as a pilot program, a single class or two of nonimmigrant visa denials (perhaps "E" visas); provide standing per A(4)(c) above; and substantially narrow the public security and safety exception. The minimal due process requirements for the board should include notice, oral evidence, disclosure of opposing evidence, attorney representation, determination on the record of the hearing, a written statement of reasons for the board's decision, and an impartial decision-maker (see Appendix F).

2. As a prerequisite for judicial review of a visa denial, Congress should require applicants to exhaust administrative remedies available from the board. Congress should also provide anyone entitled to standing under A(5)(b) above, an appeal from a decision of the proposed Visa Review Board to the federal courts.

3. Congress should continue to study structural alternatives to the present visa-issuing process. These alternatives might include such substantive

provisions to avoid overreliance on consular discretion as the "point system" for determining eligibility and such procedural provisions as greater reliance on departure controls and information.

C. With substantially greater funding, Congress should expand the scope of the Board's authority to include cases involving denials of all classes of nonimmigrant visas.

Second, Alternative Set of Recommendations

1. The State Department should adopt a regulation ensuring that applicants may be accompanied by an attorney or other authorized representative during the course of the visa application interview process. To the extent practicable, the State Department should take steps to reply promptly to communications from applicants or authorized representatives, and to ensure that applicants can feasibly meet with their representatives during the application interview process.

2. The State Department should require consular officers to provide brief but explicit statements in writing of the factual and legal bases and reasons for denying visa applications.

3. The State Department should modify its regulations to allow Visa Office advisory opinions to be made available to applicants and their authorized representatives except where national security or foreign policy reasons dictate otherwise.

4. The State Department should either comply with its regulation found at 22 C.F.R. § 41.12(c) requiring review within a consulate of each denial of a visa application or, for reasons of cost effectiveness, examine alternative, equally effective systems to review visa denials at consular posts. Such a study should be completed in one year. In undertaking the study, the State Department should keep in mind the goal of ensuring consistency in visa adjudications, and consider

possible alternatives to address exigencies created by busy consular posts, for example, by reviewing random samples of visa denials or selecting for review certain types of denials, such as in visa classes involving relatively complex standards or reflecting comparatively high rates of denial.

5. An administrative process should be established to review all denials of immigrant visas and certain types of nonimmigrant visas to be designated by the State Department. The review process should require a written petition for review; provide for discretionary review of such petitions; and, where a petition is granted, provide for an expedited review on the paper record with some opportunity to seek leave to present additional written submissions. Congress should delete the language in section 104 of the Immigration and Nationality Act that seemingly precludes the State Department from establishing an administrative entity to review consular visa denials. Upon deletion of the apparent prohibition, the State Department (or Congress) should create a suitable administrative entity within the Department to review consular visa denials. Such an administrative entity might be established either within an expanded Visa Office or as an independent Visa Review Board.

6. Congress should determine whether there is a need to authorize judicial review of at least some types of visa denials. If such a need is determined to exist, Congress should consider the following guidelines:

> a. Review should be available only for questions of law, including abuse of discretion.
>
> b. Following exhaustion of any administrative remedies, review should be in federal district court.

c. Standing should be provided for applicants and for petitioners on behalf of applicants.

Appendix A

Immigrant and Nonimmigrant Visas Issued
Top Ten Countries

Fiscal Year 1988

Immigrant [1]		Nonimmigrant [2]	
Mexico	51,783	Japan	1,789,598
Philippines	42,796	Great Britain	955,739
Korea	31,594	West Germany	702,557
Dominican Republic	26,169	Mexico	575,700
China (mainland born)	24,082	France	374,353
India	22,531	Italy	249,833
Jamaica	18,171	Australia	209,360
El Salvador	11,282	Netherlands	186,173
China (Taiwan born)	8,380	Brazil	180,975
Haiti	8,275	Switzerland	145,793

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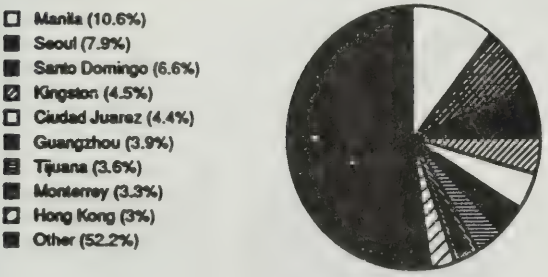
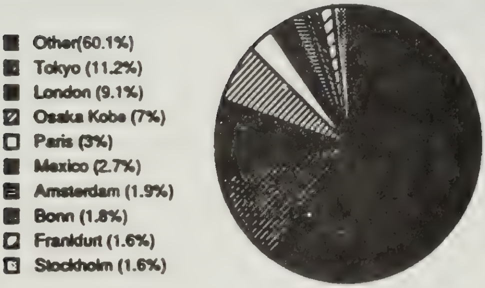
[1] Does not include replaced visas.
[2] Does not include transferred visas.

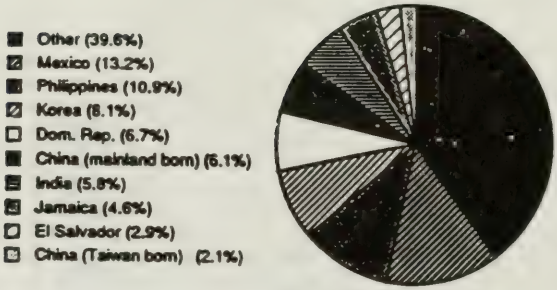


Immigrant Visa Issuances at Top Posts
Fiscal Year 1988

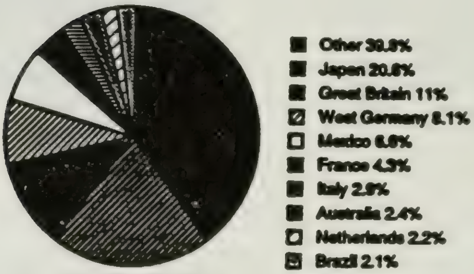


NIV Issuances at Top Posts
Fiscal Year 1988

Immigrant Visas Issued at FS Posts
By Country of Birth/Chargeability
Fiscal Year 1988



Nonimmigrant Visas Issued
By Nationality
Fiscal Year 1988



Source: United States Department of State, Bureau of Consular Affairs, REPORT OF THE VISA OFFICE 1988, at 2-4

Appendix B

The following symbols are used in issuing visas to immigrants and nonimmigrants proceeding to the United States. Unless otherwise stated, the section of law cited refers to the Immigration and Nationality Act, as amended. (66 Stat. 163, 8 U.S.C. 1101; 79 Stat. 911; 90 Stat. 2703.)

Immediate Relatives

Visa Symbol	Class	Section of Law
IR-1	Spouse of U.S. citizen	201(b)
CR-1	Spouse of U.S. citizen (conditional status)	201(b) and 216
IR-2	Child of U.S. citizen	201(b)
CR-2	Child of U.S. citizen (conditional status)	201(b) and 216
IR-3	Orphan adopted abroad by U.S. citizen	201(b)
IR-4	Orphan to be adopted in the United States by U.S. citizen	201(b)
IR-5	Parent of U.S. citizen at least 21 years of age	201(b)
VI-5	Parent of U.S. citizen who acquired permanent resident status under the Virgin Islands Nonimmigrant Alien Adjustment Act	201(b) and Sec. 2 of the Virgin Islands Nonimmigrant Alien Adjustment Act (P.L. 97-271)

Vietnam Amerasian Immigrants

AM-1	Vietnam Amerasian Principal	584(b)(1)(A) of P.L. 100-204
AM-2	Spouse/Child of AM-1	584(b)(1)(B) of P.L. 100-204
AM-3	Natural mother of unmarried AM-1 (and spouse or child of such mother), or person who has acted in effect as the mother, father, or next-of-kin of unmarried AM-1 (and spouse or child of such person)	584(b)(1)(C) of P.L. 100-104

Special Immigrants

Visa Symbol	Class	Section of Law
SB-1	Returning resident	101(a)(27)(A)
SC-1	Person who lost U.S. citizenship by marriage	101(a)(27)(B) and 324(a)
SC-2	Person who lost U.S. citizenship by serving in foreign armed forces	101(a)(27)(B) and 327
SD-1	Minister of religion	101(a)(27)(C)
SD-2	Spouse of alien classified SD-1	101(a)(27)(C)
SD-3	Child of alien classified SD-1	101(a)(27)(C)
SE-1	Certain employees or former employees of the U.S. Government abroad	101(a)(27)(D)
SE-2	Accompanying spouse of alien classified SE-1	101(a)(27)(D)
SE-3	Accompanying child of alien classified SE-1	101(a)(27)(D)
SF-1	Certain former employees of the Panama Canal Company or Canal Zone Government	101(a)(27)(E)
SF-2	Accompanying spouse or child of alien classified SF-1	101(a)(27)(E)
SG-1	Certain former employees of the U.S. Government in the Panama Canal Zone	101(a)(27)(F)
SG-2	Accompanying spouse or child of alien classified SG-1	101(a)(27)(F)
SH-1	Certain former employees of the Panama Canal Company or Canal Zone Government on April 1, 1979	101(a)(27)(G)
SH-2	Accompanying spouse or child of alien classified SH-1	101(a)(27)(G)
SJ-2	Accompanying spouse or child of an alien classified SJ (certain foreign medical graduates)	101(a)(27)(H)
SK-1	Certain retired international organization employees	101(a)(27)(I)(iii)
SK-2	Spouse of alien classified SK-1	101(a)(27)(I)(iv)
SK-3	Certain unmarried sons or daughters of international organization employees	101(a)(27)(I)(i)
SK-4	Certain surviving spouses of deceased international organization employees	101(a)(27)(I)(ii)

Appendix B (Continued)

Preference Classes

Visa Symbol	Class		Section of
1-1	First preference:	Unmarried son or daughter of U.S. citizen	203(a)(1)
1-2	First preference:	Child of alien classified P1-1	203(a)(8)
2-1	Second preference:	Spouse of alien resident	203(a)(2)
2-1	Second preference:	Spouse of alien resident (conditional status)	203(a)(2) and 216
2-2	Second preference:	Unmarried son or daughter of alien resident	203(a)(2)
2-2	Second preference:	Unmarried son or daughter of alien resident (conditional status)	203(a)(2) and 216
2-3	Second preference:	Child of alien classified P2-1 or P2-2	203(a)(8)
2-3	Second preference:	Child of alien classified C2-1 or C2-2 (conditional status)	203(a)(8) and 216
3-1	Third preference:	Professional, scientist, or artist	203(a)(3)
3-2	Third preference:	Spouse of alien classified P3-1	203(a)(8)
3-3	Third preference:	Child of alien classified P3-1	203(a)(8)
4-1	Fourth preference:	Married son or daughter of U.S. citizen	203(a)(4)
4-1	Fourth preference:	Married son or daughter of U.S. citizen (conditional status)	203(a)(4) and 21
4-2	Fourth preference:	Spouse of alien classified P4-1	203(a)(8)
4-2	Fourth preference:	Spouse of alien classified C4-1 (conditional status)	203(a)(8) and 21
4-3	Fourth preference:	Child of alien classified P4-1	203(a)(8)
4-3	Fourth preference:	Child of alien classified C4-1 (conditional status)	203(a)(8) and 21
5-1	Fifth preference:	Brother or sister of U.S. citizen who is at least 21 years of age	203(a)(5)
5-2	Fifth preference:	Spouse of alien classified P5-1	203(a)(8)
5-3	Fifth preference:	Child of alien classified P5-1	203(a)(8)
6-1	Sixth preference:	Needed skilled or unskilled worker	203(a)(6)
6-2	Sixth preference:	Spouse of alien classified P6-1	203(a)(8)
6-3	Sixth preference:	Child of alien classified P6-1	203(a)(8)

Nonpreference

NP-1	Nonpreference immigrant	203(a)(7)
NP-5	Nonpreference immigrant under Section 314 of P.L. 99-603	203(a)(7) and Se P.L. 99-603; S 100-658

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Special Agricultural Workers

Section 210 of the Immigration Reform and Control Act of 1986 provides for provisional permanent residence of persons who ha in the United States and who have performed certain seasonal agricultural services for at least 90 days during the 12 month period May 1, 1986. The application period began on July 1, 1987 and will expire November 30, 1988.

S1W	Special Agricultural Worker Group 1: Applicant who has performed seasonal agricultural services for at least 90 days during each of 3 years, entitled to adjust status to permanent residence after 1 year of temporary resident status.	210(a)(2)(A)
S2W	Special Agricultural Worker Group 2: Other seasonal agricultural program applicant, entitled to adjust status to permanent residence after 2 years of temporary resident status.	210(a)(2)(B)

Appendix B (Continued)

Nonimmigrants

Visa Symbol	Class	Section of Law
A-1	Ambassador, public minister, career diplomat, or consular officer, and immediate family	101(a)(15)(A)(i)
A-2	Other foreign government official or employee, and immediate family	101(a)(15)(A)(ii)
A-3	Attendant, servant, or personal employee of A-1 or A-2, and immediate family	101(a)(15)(A)(iii)
B-1	Temporary visitor for business	101(a)(15)(B)
B-2	Temporary visitor for pleasure	101(a)(15)(B)
B-1/B-2	Temporary visitor for business and pleasure	101(a)(15)(B)
C-1	Alien in transit	101(a)(15)(C)
C-2	Alien in transit to United Nations Headquarters district under Section 11 (3), (4), or (5) of the Headquarters Agreement.	101(a)(15)(C)
C-3	Foreign government official, immediate family, attendant, servant, or personal employee, in transit	212(d)(8)
D	Crewmember (sea or air)	101(a)(15)(D)
E-1	Treaty trader, spouse, and children	101(a)(15)(E)(i)
E-2	Treaty investor, spouse, and children	101(a)(15)(E)(ii)
F-1	Student (academic or language training program)	101(a)(15)(F)(i)
F-2	Spouse or child of student	101(a)(15)(F)(ii)
G-1	Principal resident representative of recognized foreign member government to international organization, staff, and immediate family	101(a)(15)(G)(i)
G-2	Other representative of recognized foreign member government to international organization, and immediate family	101(a)(15)(G)(ii)
G-3	Representative of nonrecognized or nonmember foreign government to international organization, and immediate family	101(a)(15)(G)(iii)
G-4	International organization officer or employee, and immediate family	101(a)(15)(G)(iv)
G-5	Attendant, servant, or personal employee of G-1 through G-4 and immediate family	101(a)(15)(G)(v)
H-1	Temporary worker of distinguished merit and ability	101(a)(15)(H)(i)
H-2	Temporary worker performing services unavailable in the United States (Petition filed prior to June 1, 1987)	101(a)(15)(H)(ii)
H-2A	Temporary worker performing agricultural services unavailable in the United States (Petition filed on or after June 1, 1987)	101(a)(15)(H)(ii)(a)
H-2B	Temporary worker performing other services unavailable in the United States (Petition filed on or after June 1, 1987)	101(a)(15)(H)(ii)(b)
H-3	Trainee	101(a)(15)(H)(iii)
H-4	Spouse or child of alien classified H-1, H-2A/B, or H-3	101(a)(15)(H)(iii)
I	Representative of foreign information media, spouse and children	101(a)(15)(I)
J-1	Exchange visitor	101(a)(15)(J)
J-2	Spouse or child of exchange visitor	101(a)(15)(J)
K-1	Fiance(e) of United States citizen	101(a)(15)(K)
K-2	Child of fiance(e) of United States citizen	101(a)(15)(K)
L-1	Intracompany transferee (executive, managerial, and specialized personnel continuing employment with international firm or corporation)	101(a)(15)(L)
L-2	Spouse or child of intracompany transferee	101(a)(15)(L)
M-1	Vocational student or other nonacademic student	101(a)(15)(M)(i)
M-2	Spouse or child of alien classified M-1	101(a)(15)(M)(ii)
N-8	Parent of an alien classified SK-3 special immigrant	101(a)(15)(N)(i)
N-9	Child of N-8 or of an SK-1, SK-2 or SK-4 special immigrant	101(a)(15)(N)(ii)
NATO-1	Principal permanent representative of member state to NATO (including any of its subsidiary bodies) resident in the U.S. and resident members of official staff; Secretary General, Assistant Secretaries General, and Executive Secretary of NATO; other permanent NATO officials of similar rank, and members of immediate family.	Art. 12, 5 UST 1094; Art. 20, 5 UST 1098
NATO-2	Other representatives of member states to NATO (including any of its subsidiary bodies) including representatives, advisers, and technical experts of delegations, and members of immediate family; dependents of members of a force entering in accordance with the provisions of the NATO Status-of-Forces Agreement or in accordance with provisions of the "Protocol on the Status of International Military Headquarters"; members of such a force if issued visas.	Art. 13, 5 UST 1094; Art. 1, 4 UST 1794; Art. 3, 4 UST 1796
NATO-3	Official clerical staff accompanying a representative of member state to NATO (including any of its subsidiary bodies) and members of immediate family.	Art. 14, 5 UST 1096

Appendix B (Continued)

Nonimmigrants (Continued)

Visa Symbol	Class	Section
NATO-4	Officials of NATO (other than those classifiable as NATO-1) and members of immediate family.	Art. 18, 5 UST
NATO-5	Experts, other than officials classifiable as NATO-4, employed in missions on behalf of NATO, and their dependents.	Art. 21, 5 UST
NATO-6	Members of a civilian component accompanying a force entering in accordance with the provisions of the NATO Status-of-Forces Agreement; members of a civilian component attached to or employed by an Allied Headquarters under the "Protocol on the Status of International Military Headquarters" set up pursuant to the North Atlantic Treaty; and their dependents.	Art. 1, 4 UST Art. 3, 5 UST
NATO-7	Attendant, servant, or personal employee of NATO-1 through NATO-6 classes, and immediate family.	Arts. 12-20, 5 1096

Source: United States Department of State, Bureau of Consular Affairs, REPORT VISA OFFICE 1988, at 119

Appendix C

The Operation of the Immigrant Numerical Control System

The Department of State is responsible for administering the provisions of the Immigration and Nationality Act (INA) relating to the numerical limitations on immigrant visa issuances. This appendix explains the operation of the immigrant number allotment and control system.

How the System Operates

At the beginning of each month, the Visa Office (VO) receives a report from each consular post listing totals of documentarily qualified immigrant visa applicants in categories subject to numerical limitation. Cases are grouped by foreign state chargeability/preference/priority date. No names are reported. The Immigration and Naturalization Service submits similar data to VO for adjustment of status cases at district offices in the U.S.

During the first week of each month, this documentarily qualified demand is tabulated.

VO subdivides the annual preference and foreign state limitations which are specified by the Immigration and Nationality Act (INA) into 12 monthly allotments. The totals of documentarily qualified applicants reported to VO are compared each month with the numbers available for the next regular allotment and numbers are allocated to reported applicants in order of their priority dates, the oldest dates first.

If there are sufficient numbers in a particular category to satisfy all reported documentarily qualified demands, the category is considered "current".

Whenever the total of documentarily qualified applicants in a category exceeds the supply of numbers available for allotment for the particular month, the category is considered to be "oversubscribed" and a cut-off date is established. The cut-off date is the priority date of the first documentarily qualified applicant who could not be accommodated for a visa number. Only persons with a priority date earlier than a cut-off date are entitled to allotment of a visa number. The cut-off dates are ordinarily the 1st, 8th, 15th, and 22d of a month, since VO groups demand for numbers under these dates. (Priority dates of the first through seventh of a month are grouped under the 1st, the eighth through the fourteenth under the 8th, etc.) The exception is an oversubscribed dependent area, for which demand is not grouped but rather recorded by actual priority date.

By the second week of each month, cut-off dates are set for the following month. The dates, along with visa allotments for use during that month, are immediately transmitted to consular posts. The cut-off dates are simultaneously made public; VO has a recorded telephone message at (202) 647-0508 which is updated whenever new cut-off dates are set. This information is then published in VO's monthly *Visa Availability Bulletin*. (Requests for inclusion on the *Visa Bulletin* mailing list may be addressed to: *Visa Bulletin*, Visa Office, Department of State, Washington, D.C. 20520).

Definition of Some Terms

Allotment: The allocation of an immigrant number to a consular office or to INS. This number may be used for visa issuance or adjustment of status, or may be returned unused to VO for reincorporation into the pool of numbers available for later allocation during the fiscal year.

Foreign State Chargeability: Ordinarily an immigrant is chargeable for visa purposes to the numerical limitation for the foreign state or dependent area of birth. Exceptions are provided for a child (unmarried and under 21 years of age) or spouse accompanying or following to join a principal to prevent the separation of family members, as well as for an applicant born in the U.S. or in a foreign state of which neither parent was a native or resident. Alternate chargeability is desirable when the visa cut-off date for the foreign state of birth of a parent or spouse is more advantageous than that of the applicant's foreign state of birth. (Ref. 22 CFR 42.12). The key determinant of foreign state chargeability is place of birth, not nationality.

Documentarily Qualified: The applicant has obtained all documents specified by the consular officer as sufficient to meet the formal visa application requirements, and necessary processing procedures of the consular office have been completed.

Appendix C (Continued)

Background Information on the System and Clarification of Some Frequently Misunderstood Points

Applicants entitled to immigrant status become documentarily qualified at their own initiative and convenience. By no means has every applicant with a priority date earlier than a prevailing cut-off date been processed for final visa action. On the contrary, visa allotments are made only on the basis of the total applicants reported documentarily qualified each month. Demand for visa numbers can fluctuate from one month to another, with the inevitable impact on cut-off dates.

If an applicant is reported documentarily qualified but allocation of a visa number is not possible because of a cutoff date, the demand is recorded at VO and an allocation is made as soon as the applicable cut-off date advances beyond the applicant's priority date. There is no need for such applicant to be reported a second time.

Visa numbers are always allotted for all documentarily qualified applicants with a priority date before the relevant cut-off date, as long as the case had been reported to VO in time to be included in the monthly calculation of visa availability. There is no exception to this principle. Failure of visa number receipt by the processing office could mean that the request was not dispatched in time to reach VO for the monthly allocation cycle, or that information on the request was incomplete or inaccurate (e.g., incorrect priority date).

Allocations outside the regular monthly cycle are possible in emergency or exceptional cases, but only at the request of the office processing the case. Note that once the retrogression of a cut-off date is announced, extraordinary requests for additional numbers from consular posts can be honored by VO only if the applicant's priority date is earlier than the retrogressed cut-off date.

Not all numbers allocated are actually used for visa issuance; some are returned to VO and are reincorporated into the pool of numbers available for later allocation during the fiscal year. The rate of return of unused numbers may fluctuate from month to month, just as demand may fluctuate. Lower returns mean fewer numbers available for subsequent reallocation. Fluctuations can cause cut-off date movement to slow, stop, or even retrogress. Retrogression is particularly possible near the end of the fiscal year as visa issuance approaches the annual limitations.

Visa issuances to any single country m
exceed the 20,000/country cap. Applican
pete for visas primarily on a worldwide b
country limitation serves to avoid monop
of virtually all the annual limitation by a
from only a few countries. The 20,000 li
is not a quota to which any particular co
entitled, however. Clearly all countries c
receive 20,000 visas, since the worldwide
annual limitation would not permit visa i
anywhere close to such a total.

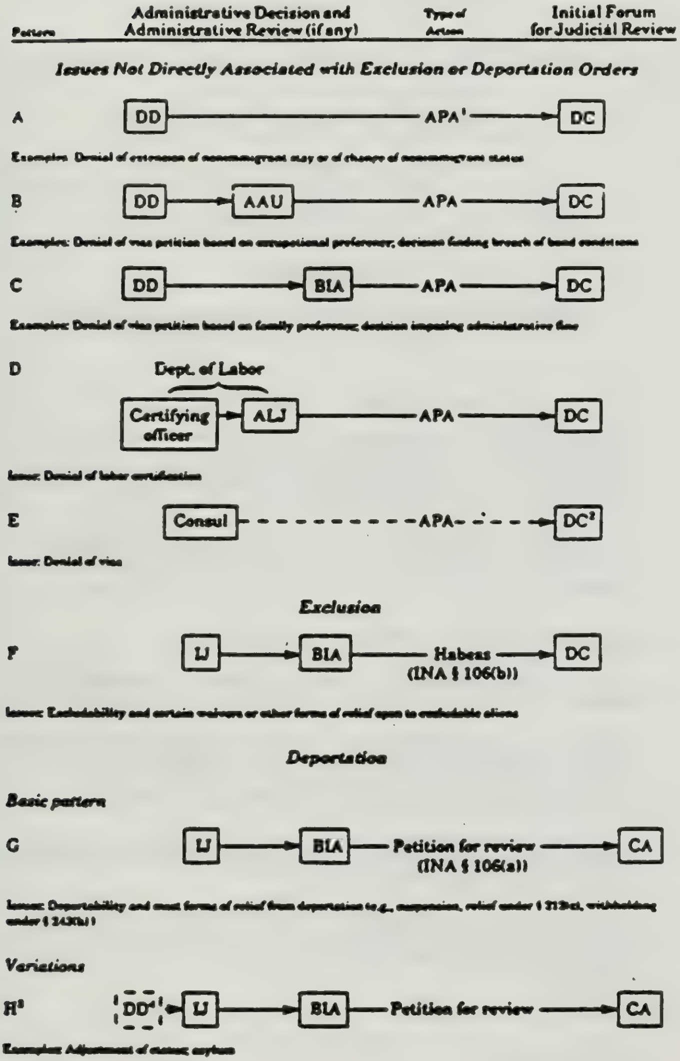
Applicability of Section 202(e) of the
Allocation prorating is required by Secti
of the INA when visas have been made a
to the chargeability area limit during the
ing fiscal year, that is, at any given point
of visa numbers allocated through the c
year, minus any unused numbers return
to that point, reaches the applicable num
limitation. Numbers returned unused su
quently will have no impact on the appl
of Section 202(e), as long as visas made
had at some point reached the full num
limitation. Allotments for an oversubscr
chargeability area are not necessarily pr
among the six preferences in each fiscal
however. If the reported demand for nu
within one or more preferences of an
oversubscribed country is insufficient to
of all numbers set aside under the term
tion 202(e), the maximum number of vi
not be made available to the particular
oversubscribed chargeability area and th
ing scheme could not apply during the
allocation year. (Note that cut-off dates
oversubscribed areas cannot be later th
wide cut-off dates, if any, for the respec
erences.) A formal determination of the
plicability of allocation prorating under
202(e) to an oversubscribed chargeabili
made by VO each September prior to t
tion of numbers for the first month of
fiscal year.

VO projections of future availabilit
time to time VO provides projections b
available data and expectations. Such p
tions—while reflecting anticipated dev
ments—cannot be taken as a guarante
availability, however. Dates must be se
month based on reported demand and
numbers.

Source: United States Department of State, Bureau of Consular Affairs, REPOR
VISA OFFICE 1988, at 123

Appendix D

Major Patterns of Administrative and Judicial Review Under the Immigration Laws


Pattern
Administrative Decision and Administrative Review (if any)
Type of Action
Initial Forum for Judicial Review
Issues Not Directly Associated with Exclusion or Deportation Orders
A
DD
APA[1]
DC
B
DD
AAU
APA
DC
C
DD
BIA
APA
DC
D
Dept. of Labor
Certifying officer
ALJ
APA
DC
E
Consul
APA
DC[2]
Exclusion
F
IJ
BIA
Habeas (INA § 106(b))
DC
Deportation
Basic pattern
G
IJ
BIA
Petition for review (INA § 106(a))
CA
Variations
H[3]
DD[4]
IJ
BIA
Petition for review
CA

A. Examples: Denial of extension of nonimmigrant stay or of change of nonimmigrant status

B. Examples: Denial of visa petition based on occupational preference; decision finding breach of bond conditions

C. Examples: Denial of visa petition based on family preference; decision imposing administrative fine

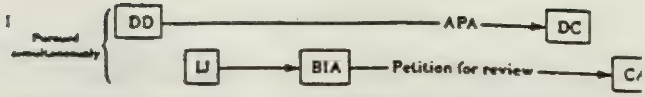
D. Issue: Denial of labor certification

E. Issue: Denial of visa

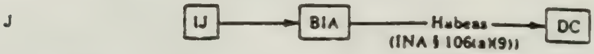
F. Issues: Excludability and certain waivers or other forms of relief open to excludable aliens

G. Issues: Deportability and most forms of relief from deportation (e.g., suspension, relief under § 212(c), withholding under § 243(h))

H. Examples: Adjustment of status; asylum

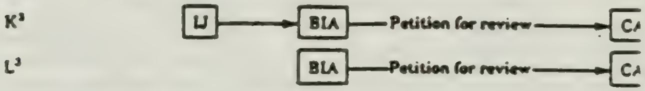


Example: Denial of extension of nonimmigrant status by DD, followed by initiation of deportation proceedings
expiration of initial admission period

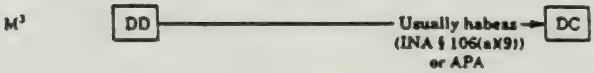


Issues: Courts differ substantially over the range of issues that may be litigated by the district court under § 106(a)(9) and over whether the alien must be in actual physical custody to secure such review. See ch. 8, note

Motion to Reopen Deportation Proceedings
(to be filed with decision maker who last heard the case)



Stay of Deportation[5]



ABBREVIATIONS: DD = District director of the Immigration and Naturalization Service
(includes certain high-volume adjudications now performed by regional service centers); IJ =
migration judge; AAU = Administrative Appeals Unit (exercising authority officially vested in
associate commissioner for examinations); BIA = Board of Immigration Appeals; ALJ = admi
trative law judge; DC = U.S. district court; CA = U.S. court of appeals.

[1] Action for declaratory or injunctive relief in accordance with the Administrative Procedure (APA); jurisdiction is usually based on Immigration and Naturalization Act (INA) § 279 or 28 U. § 1331 (1982).

[2] Authority is divided as to permissibility of judicial review.

[3] A similar pattern is possible, but less common, in exclusion cases, in which case the initial for for judicial review is clearly the district court.

[4] If the benefit has been sought before the DD, the application is renewable before the IJ, who consider it de novo. But there is ordinarily no requirement that the alien apply to the DD first; in application to the DD may be barred if exclusion or deportation proceedings have already begu application is made only to the IJ, consideration of the issue conforms to pattern C.

[5] When a stay is sought in connection with a motion to reopen, application may also be made to IJ or the BIA. Jurisdiction to review the BIA's denial of a stay (or reversal of an IJ's grant of stay) is ordinarily held to lie in the district court, as in pattern M.

NOTE: For a comprehensive description of the review process, including less common patterns depicted here, and for citations to relevant statutes and regulations, see Legomsky, *Forum Ch for the Review of Agency Adjudication: A Study of the Immigration Process*, 71 Iowa L. Rev. 1 1303-12 (1986).

Source: D. Martin, MAJOR ISSUES IN IMMIGRATION L
104-05 (1987)

Appendix E

I

100TH CONGRESS
1ST SESSION

H. R. 2567

To establish a Visa Review Board within the Department of State to review denials of certain visa applications.

IN THE HOUSE OF REPRESENTATIVES

JUNE 2, 1987

Mr. GONZALEZ introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To establish a Visa Review Board within the Department of State to review denials of certain visa applications.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. VISA REVIEW BOARD.

(a) AMENDMENT TO INA.—Chapter 3 of title II of the Immigration and Nationality Act is amended by adding after section 224 the following new section:

"VISA REVIEW BOARD

"SEC. 225. (a)(1) There is hereby established, within the Department of State, a Visa Review Board (hereinafter referred to as the 'Board') which shall be composed of regular and ad hoc members to be appointed by the Secretary of State. Regular members shall serve on a full-time basis. Ad hoc members may be designated from among senior officers of the Department of State or from persons not employed by the Department. Members shall be attorneys in good standing admitted to practice in any State, or in any territory or possession of the United States.

"(2) In considering any appeal, the Board shall act through a panel of 3 members, not more than 2 of whom may be ad hoc members, and not more than 1 of whom may be a current consular officer.

"(3) The Board shall have authority, as provided in this section, to review the case of aliens specified under paragraph (4) who have been denied visas.

"(4) An alien referred to in paragraph (3) is an alien described as follows:

"(A) a special immigrant (as defined in section 101(a)(27));

"(B) an immediate relative (as defined in section 201(b));

"(C) an immigrant having a preference status under section 203(a);

"(D) a nonimmigrant described in sections 101(a)(15)(F), 101(a)(15)(J), or 101(a)(15)(M), who is seeking to reenter the United States; or

"(E) a nonimmigrant described in sections 101(a)(15)(E)(ii), 101(a)(15)(H), 101(a)(15)(K), or 101(a)(15)(L).

"(b)(1) Whenever a consular officer shall deny an immigrant or nonimmigrant visa to an alien described in subsection (a)(4), such consular officer shall inform such alien (and any person, institution, firm, organization, or governmental agency upon whose petition immigrant or nonimmigrant status was sought for the alien) of the provisions for review under this section.

"(2) The Board shall review each denial by a consular officer of an immigrant or nonimmigrant visa to an alien described in subsection (a)(4) upon the request of such alien, or of any person, institution, firm, organization, or governmental agency upon whose petition immigrant or nonimmigrant status was sought for such alien. Such request for review must be made in writing to the Board within 60 days after receipt of notice of the denial and may be accompanied by an affidavit, signed by such alien or by any person, institution, firm, organization, or governmental agency upon whose petition immigrant or nonimmigrant status was sought for such alien, setting forth any facts which have a bearing upon such alien's eligibility for a visa.

"(c)(1) Upon receipt of any request for review under subsection (b), the Board shall, within 15 days, notify the consular officer with respect to whose decision a review is sought, and, upon receipt of such notice, such officer shall promptly (but in no event greater than 30 days after such receipt) forward to the Board a concise statement of the material facts upon which the denial of a visa was based.

"(2) The Board may, at any time after receiving a request for review under subsection (b), obtain from any consular officer such information, together with certified copies of such documents, reports, records, and other data, which are available to or obtainable by such officer, as the Board may deem necessary to properly review the case of any alien.

"(3) In reviewing the decision of a consular officer denying a visa to an alien, the Board shall hear testimony and receive evidence from (A) any official of the Government requesting the privilege to be heard with respect to a matter pending before the Board, and (B) the attorney or other designated representative of the alien with respect to whose case the Board is reviewing, or the attorney or other designated representative of the institution, firm, or organization upon whose petition immigrant or nonimmigrant status was sought for such alien.

"(d)(1) In reviewing the decision of any consular officer denying a visa to an alien, the Board shall consider all the information before it with respect to such alien, and shall give due consideration to the reasons set forth by such officer for denial of a visa. To be effective, the decision of the Board must be concurred in by at least two members, and shall affirm, overrule, or remand, for further consideration, the decision of such officer.

"(2) If the Board overrules the decision of a consular officer with respect to the eligibility of an alien for a visa, such officer shall, upon notification by the Board, promptly cause the issuance of the visa to such alien which would have been issued to the alien if the visa had been approved.

"(e) Nothing contained in this section shall require the Board, or any officer or employee of the United States or any consular officer to make public disclosure of any confidential information the disclosure of which, in the opinion of the Board, such officer or employee, or such consular officer, as the case may be, would be prejudicial to the public interest, safety, or security.".

(b) REGULATIONS.—Within 120 days after the date of the enactment of this Act, the Secretary of State shall establish rules and regulations implementing the authority of the Visa Review Board established under section 225 of the Immigration and Nationality Act (as added by subsection (a)).

(c) CONFORMING AMENDMENT TO TABLE OF CONTENTS.—The table of contents is amended by inserting after the item relating to section 224 the following new item:

"Sec. 225. Visa review board.".

(c) TECHNICAL AMENDMENT.—The first clause of section 104(a) of the Immigration and Nationality Act is amended by striking ", except that" and all that follows through "refusal of visas".

○

Appendix F

Due Process Ingredients by Type of Administrative Review

FUNCTIONS

Ingredients	Denaturalization	Deportation	Asylum	Exclusion	Parole/ Detention	Discretionary Decisions
Notice	+	+	−	−	+	+
Confrontation	+	−	−	−	−	−
Oral Argument	+	−	−	−	−	−
Oral Evidence	+	+	+	+	−	−
Cross-Examination	+	+	−	+	−	−
Disclosure of Opposing Evidence	+	+	+	+	+	+
Retaining Attorney	+	+	+	+	+	+
Determination on Record	+	+	−	+	−	−
Statement of Reasons	+	+	−	+	+	+
Impartial Decider	+	+	+	+	+	+

Source: Verkuil, A Study of Immigration Procedures, 31 U.C.L.A. L. Rev. 1141, 1165 (1984)

THE SOCIAL SECURITY ADMINISTRATION'S ADMINISTRATIVE APPEALS PROCESS

A Report for the
Administrative Conference
of the United States

Frank S. Bloch
Professor of Law
Vanderbilt University

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I. INTRODUCTION

During the past year, the Social Security Administration has devoted a great deal of its resources to considering possible reforms for its administrative appeals process. Because the vast majority of contested Social Security and Supplemental Security Income benefits claims involve disability-based benefits, the focus of the Administration's efforts in this area has been on disability adjudications.[1] In 1988, the Social Security Administration prepared a staff draft of changes in its administrative appeals process for possible publication as proposed rules.[2] In response to concerns raised about some of the proposals in Congress and elsewhere, the Administration decided to undertake further study of the need for administrative appeals reform before formally publishing proposed rules. As part of this process, the Social Security Administration asked the Administrative Conference of the United States to prepare this report.[3]

The Social Security Administration requested that this report include three substantive topics: a comparative analysis of the administrative appeals process used in a group of federal disability programs, a synthesis of prior recommendations of the Administrative Conference relating to Social Security administrative appeals, and a legal analysis of the provisions of the Administrative Procedure Act and the Social Security Act applicable to Social Security disability appeals. Parts II, III and IV, respectively, of this report cover these three topics. Part V includes a summary of this material and a set of recommendations.

Although the topic of this report is the administrative appeals process, some attention must be paid to procedures used in making initial decisions. Obviously, the quality of initial decisions, including the quality of the evidentiary record developed to support initial decisions, has an important effect on the procedures in place for appealing from initial decisions. In the simplest sense, one can assume that higher quality initial decisions would result in fewer appeals and therefore less pressure on an appellate system that might function quite differently with a significantly reduced caseload. There is also little doubt that poor development of evidentiary records at the initial stages of the process will affect the nature of a subsequent appeal. Thus, it has been found that by far the most important work of lawyers representing Social Security claimants is the compilation and submission of evidence to supplement the limited record typically compiled at the initial decision level.[4] Even if the initial decision process is functioning quite well, the appeals process can be adversely affected by a failure to communicate effectively to claimants the basis for decisions and the underlying facts considered in making that decision. For these reasons, some material relating to the initial decision process is included in this report and addressed in the recommendations.

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[1] Congress has also concentrated its concern with the Social Security program on disability adjudications. *See, e.g.*, Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984).

[2] *See* Department of Health and Human Services, Social Security Administration, draft proposed rules (undated) [hereinafter Social Security Administration Draft Proposed Rules].

[3] The Social Security Administration has also requested the assistance of two other bodies: the Disability Advisory Committee, made up of the former Disability Advisory Council, which has been charged with holding hearings and preparing a report and recommendations; and a panel of experts in the field which will work with the Administration in formulating its recommendations.

II. COMPARATIVE ANALYSIS OF ADMINISTRATIVE APPEALS PROCESS FOR FEDERAL DISABILITY PROGRAMS

In most federal disability programs there are three distinct levels of administrative appeal from an original determination. Although the specific procedures used and the level of formality may differ, a claimant dissatisfied with an original determination can usually seek a review or reconsideration of the original decision still within the agency, followed by an administrative hearing before a hearing officer, administrative law judge or referee, and then a final post-hearing review by a central administrative appeal board. Generally, a claimant must pass through each administrative appeal level as a precondition to the next level of review and must exhaust all levels of administrative appeal in order to seek judicial review, although there are exceptions to this rule in some programs.

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[4] *See generally* Popkin, *The Effect of Representation in Non-Adversary Proceedings - A Study of Three Disability Programs*, 62 Cornell L. Rev. 989, 1027 (1977). *See also* Dixon, *The Welfare State and Mass Justice: A Warning From the Social Security Disability Program*, 1972 Duke L.J. 681. The percentage of Social Security claimants represented by lawyers has increased dramatically during the past twenty years, particularly at the administrative hearing level. Thus, in 1970, lawyers participated in 20 percent of all hearings; in 1980 lawyers participated in 41 percent; in 1987, they participated in 66 percent. Department of Health and Human Services, Social Security Administration, Report to the Lawyers on Attorney Fees Under Title II of the Social Security Act 13 (1988).

The administrative appeals process in place for each of the programs included in this study will be described and analyzed in relation to each other with respect to each of these levels of appeal. Although the appeal process begins only with the filing of an appeal from an agency decision, the process leading to the agency decision and the transmittal of that decision to the claimant can have a significant impact on how the appeals process works. Accordingly, a brief discussion of the process for reaching agency decisions in disability claims precedes the discussion of the three levels of administrative review.

Because this report covers only procedural issues, the comparative material in this section is limited to the administrative appeals process used in various federal disability programs, as opposed to the substantive disability standards that are applied. Although procedure and substance can be separated successfully for most of the purposes of this report, a brief statement of each of the disability standards used in the disability programs discussed in this section will help put the comparative analysis of administrative appeal procedures in context. The key operative element of the Social Security disability standard is the "inability to engage in any substantial gainful activity."[5] The ability to engage in substantial gainful activity is determined in light of the claimant's age, education and prior work experience.[6] Most Railroad Retirement disability claims are governed by a disability standard that is effectively the same as the Social Security standard.[7] Employees, however, are entitled to disability benefits under the Civil Service Retirement Program when they can no longer perform their regular job effectively and cannot be transferred into a vacant comparable position.[8] Veterans disability benefits are awarded under the "compensation" program for total or partial disability caused or aggravated while in active service, based on the effect of the impairment on earning capacity;[9] and under the "pension" program to low-income veterans who are "permanently and totally disabled."[10] Finally, Black Lung disability benefits are provided to miners only if they are totally disabled due to black lung disease caused by coal mine employment.[11]

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[5] 42 U.S.C. § 423(d)(1)(A) (1982). This standard applies to Disability Insurance Benefits claims; a substantially identical standard is used for Supplemental Security Income claims. *See id.* § 1382c(a)(3)(A). More restricted standards are used for disabled spouses under the Survivors Insurance Program and for children under the Supplemental Security Income program. *See id.* §§ 423(d)(2), 1382c(a)(3)(A). There are separate, identical regulations for Disability Insurance Benefits and Supplemental Security Income; however, in this report only the Disability Insurance Benefits regulations are cited.

[6] *Id.* §§ 423(d)(2)(A), 1382c(a)(3)(B). These vocational factors are not included in the disability standard for spouse's Survivors Insurance Benefits or child's Supplemental Security Income.

[7] Although the statutory standard for total disability is phrased somewhat differently, *see* 45 U.S.C. § 231a(a)(1)(v), it has been interpreted consistently as identical to the Social Security standard. *See, e.g.*, Estes v. Railroad Retirement Board, 776 F.2d 1436, 1438 (9th Cir. 1985); Duncan v. Railroad Retirement Board, 375 F.2d 915, 917 (4th Cir. 1967). Some claims are decided under a different "occupational disability" standard which is based on the claimant's ability to perform his or her regular, railroad-related occupation. *See* 45 U.S.C. § 231a(a)(1)(iv).

A few comments about the relative number of disability claims adjudicated in each program are also relevant. At most levels of adjudication, the Social Security and Veterans programs must be separated from the others as involving a much higher number of claims. Thus, there are over 1,000,000 claims per year at the initial decision level in the Social Security and Veterans programs, and less than 10,000 in the Railroad Retirement, Black Lung and Civil Service programs; at the administrative hearing and post-hearing administrative review levels, there are similar order-of-magnitude differences, with over 250,000 Social Security administrative hearings each year and over 50,000 cases at the Appeals Council and Board of Veterans Appeals, compared with, for example, less than 1,000 hearings and less than 100 post-hearing reviews in the Railroad Retirement and Civil Service programs. There are, however, some deviations from this general pattern. Thus, there are considerably less hearings in the Veterans programs compared to the Social Security program, probably because Veterans hearings are optional. Also, there are a relatively high number of hearings and post-hearing reviews in the Black Lung program compared to the number of initial applications -- approximately 7,000 hearings and 4,000 cases at the Benefits Review Board each year -- because many Black Lung cases are appealed over a long period of time.[12]

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[8] *See* 5 U.S.C. § 8337(a).

[9] *See* 38 U.S.C. § 355.

[10] *Id.* § 521(a).

[11] *See* 30 U.S.C. § 901(a).

[12] This data was compiled from the following sources: Staff of House Comm. on Ways and Means, Background Material and Data on Programs within the Jurisdiction of the Committee on

A. Initial Determination of Disability

Initial disability determinations are made by agency level examiners and, to one degree or another, agency medical staff. A claims file is developed to include relevant medical evidence; claimants are expected to participate in developing relevant evidence and, in many instances, are required to submit to special examinations. Then, an eligibility decision is made by applying the evidence compiled to the applicable disability standard. Claimants are notified of the decision in writing, with some form of explanation of the basis for the decision.

1. Social Security Initial Determination

Initial decisions on Social Security disability claims are made by the Social Security Administration together with state agencies known as Disability Determination Services.[13] The Social Security Administration processes all aspects of the claim unrelated to disability and transmits the formal notice of decision to the claimant. The actual determination of disability is delegated to the Disability Determination Service in the state.[14] The Disability Determination Service is responsible for compiling and developing all medical evidence, evaluating that evidence and reaching a decision as to whether the claimant meets the applicable disability standard.

Disability determinations are made by a disability examiner together with a member of the Service's medical staff, known as a medical consultant. They also decide whether additional evidence is needed and will, in many cases, order a special examination of the claimant by a

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Ways and Means, 1989 Edition (1989); U.S. Department of Labor, Black Lung Benefits Act, Annual Report on Administration of the Act During Calendar Year 1986 (1989); U.S. Merit Systems Protection Board, A Study of Cases Decided by the U.S. Merit Systems Protection Board in Fiscal Year 1987 (1988); Veterans Benefits Administration Hearings Conducted by Hearing Officers -- Cumulative Report for FY 1989 (Oct-Mar) (May 1989); Board of Veterans Appeals, Appeals Statistical Data -- Board of Veterans Appeals (May 1989); Letter from Leroy Blommaert, Office of Information Resources Management, Railroad Retirement Board (July 3, 1989); Letter from Bonner H. Day, Public Affairs Specialist, Office of Public Affairs, Veterans Administration (June 12, 1989); Letter from Robert H. Kravetz, Director of Administration and Management, Benefits Review Board (July 10, 1989); Internal Memorandum from Dan Peed to Randy Berholtz, U.S. Department of Labor, Division of Coal Mine Workers Compensation (May 4, 1989); telephone interview with Chris Brown, Office of Personnel Management (May 23, 1989).

[13] *See generally* 42 U.S.C. § 421(a) (Supp. IV 1986); 20 C.F.R. §§ 404.1601 - .1694 (1988).

[14] The Social Security Administration has the authority to remove this function from a state if the state agency is not performing up to standards. *See* 42 U.S.C. § 421(b)(1).

physician on contract with the agency. A special form, known as a disability transmittal form, is used by the Service to record the disability determination. A brief rationale for the decision, including a statement of the medical evidence relied upon in making the determination, is included as part of that form. The statement of rationale and evidence relied upon is then incorporated in the formal notice of decision issued by the Social Security Administration to the claimant.

2. Initial Determination in Other Programs

Initial decisions in other federal disability programs are made by agency staff, without the use of an outside agency. The Railroad Retirement Board's Bureau of Retirement Claims in Chicago, for example, operates much like a national Disability Determination Service, applying essentially the same criteria as the Social Security Administration.[15] The only difference is that medical consultants participate in the process at the option of the examiner. Similarly, Civil Service disability retirement claims are processed entirely by the Office of Personnel Management.[16] All initial disability determinations are made at the central office in Washington. Claims are evaluated initially by a medical consultant, usually on the basis of evidence supplied by the claimant. The agency can order a medical examination of the claimant, if necessary;[17] however, this authority is used infrequently. The actual disability decision is made by a disability claims examiner, who uses the medical consultant's recommendation and the examiner's own evaluation of the evidence in the file. A written initial decision is then issued by the Office of Personnel Management, which must include findings of fact and relevant conclusions.[18]

A more elaborate process is used in reaching a final initial determination of eligibility in Black Lung cases than in other programs. Claims are processed by the Division of

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[15] For most purposes, the Railroad Retirement disability standard is identical to the Social Security standard. See note 7 supra, and accompanying text.

[16] See generally 5 U.S.C. § 8337 (1982); 5 C.F.R. § 831.501 (1988). Prior to January 1979, the program was administered by the Civil Service Commission. Claims are processed first at a central facility for purposes of evaluating eligibility criteria unrelated to disability. See id. §§ 831.102, .104, .501(c).

[17] See id. § 831.502(b).

[18] See 5 C.F.R. § 831.1205(b).

Coal Mine Workers Compensation of the Department of Labor's Office of Workers Compensation Programs.[19] Disability determinations are made by a deputy commissioner of the Division of Coal Mine Workers Compensation at regional offices throughout the country.[20] The deputy commissioner makes the decision on the basis of evidence supplied by the claimant and the results of a medical examination by an outside medical consultant which is ordered routinely.

The deputy commissioner first makes an "initial finding of eligibility," which, if unfavorable to the claimant, must include a statement of the reasons for the finding and a statement of the additional evidence necessary to establish eligibility.[21] If the deputy commissioner finds that the claimant is eligible for benefits, the process shifts into an adversarial mode in which a "responsible coal mine operator" is identified and given the opportunity to participate in the proceedings.[22] If there is no responsible coal mine operator, then the deputy commissioner will issue a "proposed decision and order" with findings of fact and conclusions of law.[23] If there is a responsible coal mine operator, the operator can participate fully in the proceedings; if the operator is identified only after initial findings are made, the operator can submit its own evidence and request another examination of the claimant before a proposed decision and order is issued.[24] The proposed decision and order is the final determination by the deputy commissioner unless objected to or unless the claim is submitted by the deputy commissioner for a hearing before issuing a proposed decision and order.[25] The deputy commissioner can also hold a conference with all the parties and attempt to resolve or limit issues before issuing a proposed decision and order.[26]

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[19] *See generally* 30 U.S.C. §§ 901-950 (1982 and Supp. IV 1986); 20 C.F.R. § 725.304(b) (1988).

[20] *Id.*

[21] 20 C.F.R. § 725.410(c) (1988).

[22] *Id.* §§ 725.410(b), (c) (2). A responsible coal mine operator, which may or may not exist with respect to a particular claim, is a coal mine operator given responsibility for payment of the claimant's benefits by virtue of the claimant having worked at the operator's coal mine under circumstances outlined in the Black Lung Benefits Act. *See* 30 U.S.C. § 802(d) (1982); 20 C.F.R. § 725.492, .493 (1988).

[23] *See* 20 C.F.R. § 725.418.

[24] *See id.* § 725.414.

[25] *See id.* § 725.415. Objections to a proposed decision and order are discussed at text accompanying notes 51-53, *infra.* Direct referrals for hearing by the deputy commissioner are rare.

Veterans disability benefits are processed initially at local offices of the Department of Veterans Affairs by the Compensation and Pension Service in the Veterans Benefits Administration.[27] Preliminary evaluation of a claim, particularly with respect to issues unrelated to disability, is done by an "authorization unit." The responsibility for determining disability, including most of the responsibility for developing medical evidence, lies with the Rating Board, a panel of three people, one of whom is a medical doctor.[28] The Board can request additional medical information and order special examinations, usually from medical staff at Veterans Administration medical facilities.

Rating decisions are prepared by the members of the Board, and signed by all three members before returned to the authorization unit for implementation. There are specific guidelines for Rating Board decisions, which must include a listing of any combat disabilities, a finding of employability, if relevant to the determination, and a "narrative."[29] The narrative must include a statement of the issues involved in the claim, a recitation of all facts relevant to the determination of the claim, and a discussion of the reasons for the conclusion reached.[30] The claimant is notified of the decision by the authorization unit through a Notice of Decision which states the reason for the decision, including the rating decision if one was made.[31]

B. Administrative Review Prior to Hearing

All programs provide claimants with an opportunity to request a review of an initial determination on a disability claim at the agency level, before requesting an administrative hearing. In some programs a request for an agency review of the determination is a precondition to a request for an administrative hearing. In other programs, a second administrative review is available at the option of the claimant.

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[26] *Id.* §§ 725.416-.417.

[27] *See* 38 C.F.R. § 3.100 (1988).

[28] *See* Veterans Administration Manual M21-1 § 45.01(b).

[29] *Id.* §§ 49.11, .12, .17.

[30] *Id.* § 49.17(g). As stated in the Manual, "[t]his discussion and reasoning is what the Board adds to the evidence. Whatever is necessary to justify the conclusions should be cited." *Id.*

[31] *See* 38 C.F.R. § 3.103.

1. Social Security Reconsideration

The Social Security Administration's reconsideration procedure is a good example of a formal administrative review which a claimant must pursue prior to requesting a hearing.[32] A request for reconsideration, which must be filed within 60 days of receipt of notice of a decision,[33] triggers a reexamination of all of the evidence in the file as well as additional information submitted by the claimant with the request. As with initial decisions, a reconsideration request is reviewed initially at the local Social Security Administration office, and then forwarded to the Disability Determination Service when the contested issue is disability.

The reconsideration process begins with an effort to include in the reconsideration file all current medical information and an explanation of why the claimant disagrees with the initial determination. Then, if it appears that the medical record is insufficient or contains conflicting evidence, new medical information is obtained either from existing sources or by ordering new consultative examinations.[34] A reconsideration decision is then made by a disability examiner and a medical consultant who were not involved in the initial determination. The same standards are used as those that apply to the initial determination, and the notification process following reconsideration is the same as with an initial decision.

A modified reconsideration procedure is used when the "initial decision" is to terminate benefits following a "continuing disability review" in which the Social Security Administration found, on the basis of medical evidence, that the claimant's disability ceased.[35] As the result of controversy surrounding the procedures used to effectuate continuing disability reviews in the early 1980s, Congress required the Social Security Administration to provide for some form of hearing as part of the reconsideration process in those cases.[36] Reconsiderations in continuing disability review cases are conducted by special "CDR examiners" according to essentially the same procedures as regular reconsiderations.[37] However, if the termination is upheld, the claimant is given the opportunity to request a "disability hearing" before the reconsideration decision is final.[38] These hearings are held at the Disability Determination Services by special hearing officers, who reevaluate the claim based on the evidence in the record and any testimony presented at the hearing. Claimants can be represented, and can present their own testimony as well as testimony of witnesses.[39] The hearing officer then makes a determination on disability, which becomes the final reconsideration decision on the claim.[40]

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[32] There is no "reconsideration" of a decision granting benefits; however, there are separate internal quality control procedures for monitoring and reviewing decisions generally.

[33] *See* 20 C.F.R. § 404.909(a) (1988). There are rules for extension of the period within which reconsideration can be requested upon a showing of "good cause." *Id.* § 404.911.

[34] *See generally* POMS § DI3201.B; 20 C.F.R. § 404.913(a).

[35] *See* 20 C.F.R. § 404.913(b). A finding that a claimant is no longer disabled can be based on non-medical factors, such as a return to work. *See id.* § 404.1594(f)(1).

2. Reconsideration or Agency Review in Other Programs

Reconsideration procedures for Railroad Retirement disability claims are the same as those used for Social Security claims, except that there are no continuing disability reviews in that program and therefore there are no special disability termination hearings.[41] A similar but more limited procedure is used for reconsideration of initial decisions by the Office of Personnel Management in Civil Service disability claims. A claimant must request reconsideration in writing within 30 days after receipt of the initial decision.[42] An appeal to the Merit Systems Protection Board for a hearing can be made only following a final decision on reconsideration.[43] The main difference is that reconsideration review is based only on the record compiled on the initial application; there are no provisions for developing further evidence at this stage in the process.

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[36] *See* Social Security Amendments of 1983, Pub. L. No. 97-455, 96 Stat. 2498 (1983). *See also* 48 Fed. Reg. 36,831 (1983); 20 C.F.R. §§ 404.913(b), .914-.918.

[37] "CDR examiners" are experienced disability examiners trained specially to review continuing disability review claims.

[38] *See* 20 C.F.R. § 404.913(b).

[39] *See id.* §§ 404.916(b).

[40] *Id.* § 404.917(d).

[41] As with Social Security claims, reconsideration is a precondition to requesting an administrative hearing. *See* 20 C.F.R. § 404.930.

[42] 5 C.F.R. § 831.109(d) (1988). The time limit may be extended under limited circumstances. See id. § 831.109(e)(2).

[43] *Id.* § 831.110.

There must be a written decision on reconsideration which includes a full statement of relevant findings and conclusions.[44]

A request for reconsideration in a Veterans disability claim is processed much like a Social Security reconsideration request, except that the review is less formal and claimants have the option to seek agency level review of an initial decision or to proceed directly to a hearing.[45] A claimant is expected to furnish additional evidence, if relevant, and indicate errors of fact or law in the original notice of decision. This material is reviewed by the authorization unit, and then referred to the Rating Board "[i]f there is any question as to the probative value of medical evidence or whether consideration by the Rating Board is warranted."[46] Otherwise, the reconsideration is completed by the authorization unit. If the claim is referred to the Rating Board, it proceeds with the reconsideration decision in the same manner as an initial decision; if referral to the Rating Board is considered unnecessary, the reconsideration request is denied by the authorization unit. If reconsideration is denied, the notice is to include a full explanation of the reasons.[47] A decision denying reconsideration can then be appealed in the same manner as an initial decision.[48]

Veterans Benefits Administration procedures also allow claimants to request that their claims be reopened after the time to appeal has expired. In effect, this allows claims to be refiled on the same basis as an earlier application but supported with new facts.[49] When new facts are alleged supporting an earlier claim it is adjudicated without regard to the prior decision on the issue of disability. Even if the claim is reopened on the basis of the same facts, benefits can be awarded if there has been a change in the law or, under limited circumstances, as an "equitable entitlement."[50]

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[44] *Id.* § 831.109(f).

[45] In both programs a request for reconsideration can be made up to the time for requesting an appeal. For Veterans Disability Benefits the period is one year, 38 C.F.R. § 19.129 (1988); for Black Lung Benefits the time period is 60 days, 20 C.F.R. § 725.410(c)(2) (1988).

[46] *See* Veterans Benefits Administration Manual M21-1 § 27.02(a).

[47] *Id.* § 27.04. The actual quality of many notices is, however, quite poor. The U.S. General Accounting Office is conducting a study which includes the quality of Veterans Benefits Administration disability notices.

[48] *Id. See also* 38 C.F.R. § 3.103.

[49] *See generally id.* § 3.160(e).

The reconsideration procedures discussed so far are, in effect, opportunities for an appeal from a final, initial decision. The decision process at the agency level is thus broken into two distinct parts: The initial decision following procedures for developing and evaluating relevant evidence, and a reassessment of the initial decision followed by a review of that decision and promulgation of a new decision. In the Civil Service program, the review is based on the existing record; in other programs, the existing record is evaluated for completeness and, if necessary, supplemented.

An entirely different approach to administrative review prior to hearing is followed in the Black Lung program. Rather than provide for an intermediate, limited agency-level appeal, the process in the Black Lung program is more like an optional extension of the initial decision process. The notice of an initial decision in a Black Lung claim includes a statement of additional evidence that would be necessary to establish eligibility.[51] The claimant then has 60 days within which new evidence can be submitted or a hearing can be requested.[52] If the claimant does not want to submit new evidence to the deputy commissioner, then there is no further review at that level; the only option then is to request a hearing. If new evidence is submitted, a new decision is made by the deputy commissioner on the basis of the entire record, including the new evidence.[53] As with initial decisions, if a new finding is made that the claimant is eligible and if a responsible coal mine operator is identified, the operator is given the opportunity to submit its own evidence, request a new medical examination and request a new decision on eligibility.[54] When a responsible operator is involved, the deputy commissioner can schedule a conference with the parties in order to resolve or limit the issues before issuing a proposed decision.[55]

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[50] *See* 38 U.S.C. § 210(c)(2), (3)(A) (Supp. IV 1986). Equitable entitlement is authorized only when the denial was due to administrative error or if the claimant relied on an improper grant and suffered a loss on that basis without knowing the original grant was improper. *Id.*

[51] 20 C.F.R. § 725.410(c) (1988). *See also* text accompanying note 21, *supra.*

[52] *Id.*

[53] If the claim is denied again, a request for a hearing can still be filed within 60 days following the second denial. 20 C.F.R. § 725.410(c)(2).

[54] *See id.* § 725.414.

[55] *Id.* § 725.415.

The deputy commissioner then issues a proposed decision and order which contains findings of fact and conclusions of law.[56] The parties may then respond by requesting a revision of the decision or by requesting a hearing within 30 days. A request for a revision must "specify the findings and conclusions with which the responding party disagrees."[57] The deputy commissioner, in acting on a request to revise a proposed decision and order, may simply deny the request, amend the decision and order, or "take such other action as is appropriate," including the development of additional evidence.[58] The deputy commissioner's revised decision and order or the refusal of the deputy commissioner to revise the proposed decision and order may be appealed through a request for a hearing.[59]

C. Administrative Hearings

The administrative hearing is the most important element of the administrative appeals process for all the programs included in this study. The general model is to set the hearing level apart as a separate opportunity for a *de novo* review of prior agency action on an application for benefits. Thus, at the Social Security Administration, the Railroad Retirement Board and the Department of Labor, claims are transferred to separate offices -- the Social Security Administration's Office of Hearing and Appeals, the Railroad Retirement Board's Bureau of Hearings and Appeals, and the Department of Labor's Office of Administrative Law Judges -- for hearing, and Civil Service disability retirement claims are transferred for hearing from the Office of Personnel Management to the Merit Systems Protection Board. The Veterans Benefits Administration handles appeals somewhat differently, although recently it also has moved toward separating the administrative hearing procedure from the rest of the agency-level decisionmaking process.

1. Social Security Hearings

Social Security claimants may request a hearing before an administrative law judge within 60 days following receipt of a decision on a request for reconsideration. The hearing request is submitted on a standard form which requires only a general statement of the basis for the appeal.[60] The entire record is transferred from the local district office to the local office of the Office of Hearings and Appeals. Cases are then usually assigned to a particular administrative law judge. At this point the file is reviewed by a hearing assistant who selects essential documents for inclusion in the appeals file[61] and assesses the evidence in order to determine whether additional factual development is needed. Development of additional evidence relating to disability includes obtaining existing records from treating sources or hospitals, soliciting written reports from treating sources with respect to the claimants' disabilities, and ordering special medical examinations by consulting physicians chosen from a panel provided by the Disability Determination Services. The extent and nature of factual development at the Office of Hearings and Appeals varies widely from office to office and from judge to judge. Claimants are also notified that they may submit additional medical evidence on their own.[62]

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[56] *Id.* § 725.418(b).

[57] *Id.* § 725.419(a), (b).

[58] *Id.* § 725.419(c).

[59] *Id.*

The general pattern is for the administrative law judge and his or her staff to review and develop evidence independently, without communicating or coordinating with the claimant and the claimant's representative. Social Security Administration regulations provide that the administrative law judge may hold a prehearing conference in order to focus the issues to be considered at the hearing and to identify necessary factual development.[63] In addition, administrative law judges have the authority to subpoena witnesses, either on their own or on behalf of a claimant.[64] In practice, however, the prehearing procedures and the subpoena power are used rarely.

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[60] The form currently in use, Form HA-501-U5, states on behalf of the claimant that he or she disagrees with the determination, and then provides two blank lines following the statement, "My reasons for disagreement are:".

[61] Material from the original file not included in the appeal file is kept in a separate file known as a "junk" file.

[62] Thus, the form on which a hearing is requested includes a box to check if additional evidence will be submitted, as well as a box to check if the claimant has no additional evidence to submit.

[63] *See* 20 C.F.R. § 404.961 (1988).

[64] Claimants must request a subpoena from the judge in advance. *See id.* § 404.950(d).

Social Security administrative hearings are non-adversarial and the Social Security Administration is not represented.[65] The administrative law judge engages in a *de novo* review of the claim based on all of the evidence in the record, including testimony presented at the hearing.[66] The administrative law judge is required to examine all of the issues raised by the claimant fully and to receive into evidence all relevant documents and testimony.[67] Moreover, the judge is charged with the responsibility for assuring that all evidence necessary to resolve the claim is included in the record, particularly when the claimant is unrepresented.[68] The judge has an affirmative responsibility in this regard; he or she "acts as an examiner charged with developing the facts."[69] The non-adversarial nature of the proceeding places a basic duty of inquiry on the administrative law judge "to inform himself about facts relevant to his decision and to learn the claimant's own version of those facts."[70]

The administrative hearing itself is extremely important to claimants, for it is the one opportunity they have to appear personally to present their claim before a decisionmaker who has access to the complete record in the case. Although claimants are entitled to appear and testify at the hearing,[71] an administrative law judge may issue a decision wholly favorable to the claimant without a hearing.[72] The administrative law judge's responsibility to develop issues fully includes the responsibility to assure that witnesses are questioned properly. Problems occur in this regard most frequently with vocational experts; the administrative law judge must make sure that hypothetical questions based on all of the claimant's medical conditions have been asked and that opinions are not given based on facts unsupported by the record.[73]

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[65] *See id.* § 404.900(b); Ware v. Schweiker, 651 F.2d 408, 413 (5th Cir. 1981), *cert. denied*, 455 U.S. 912 (1982). The Administration ran a demonstration project in the mid-1980s known as the "Government Representative Experiment" in which it was represented at hearings where the claimant was represented, but it was not implemented systemwide. *See* 47 Fed. Reg. 36,117 (1982).

[66] *See* 20 C.F.R. § 404.953(a). The process is informal; however, witnesses testify under oath and a full transcript of the hearing is made. *Id.* §§ 404.950(e), .951.

[67] *Id.* § 404.944.

[68] *See generally* Bloch, *Representation and Advocacy at Non-adversary Hearings: The Need for Non-adversary Representatives at Social Security Disability Hearings*, 59 Wash. U. L. Q. 349 (1981). *See also* Smith v. Bowen, 687 F.Supp. 902, 906 (S.D. N.Y. 1988) ("The administrative law judge's duty to develop the comprehensive record . . . is greatest when claimant is unrepresented; but the duty still exists when the plaintiff is represented").

[69] Richardson v. Perales, 402 U.S. 389, 410 (1971). *See also* Echevarria v. Secretary, 685 F.2d 751, 755 (2d Cir. 1982) ("the ALJ, unlike a judge in a trial, must himself affirmatively develop the record"); Poulin v. Bolin, 817 F.2d 865, 870-71 (D.C. Cir. 1987) ("administrative law judge has affirmative duty to . . . develop the comprehensive record requisite for a fair determination of disability)".

[70] Dixon v. Heckler, 811 F.2d 506, 510 (10th Cir. 1987), *citing* Heckler v. Campbell, 461 U.S. 458, 471 n.1 (1983) (Brennan, J., concurring).

Administrative law judges also have the authority to call a medical expert, often referred to as a "medical advisor," at the hearing.[74] Some judges do this frequently, others infrequently, and many not at all. When medical advisors are called to testify, they are to do so as neutral experts subject to cross examination.[75] Similarly, administrative law judges must assure that other witnesses, including the claimant, are questioned so that their testimony is presented effectively.[76]

Consistent with the informal nature of the Social Security Administration's administrative hearing procedures, "[i]n making a decision [the Administration] will consider all information [it] gets from [the claimant] and others about [the claimant's] impairments."[77] There are no formal requirements for the presentation of evidence and the formal rules of evidence do not apply.[78] Thus, written reports from witnesses, including medical experts, are accepted into the record without technical objection.[79] Documentary evidence is accepted from the claimant at the hearing and, at the option of the administrative law judge, after the hearing within a limited period of time set by the judge. In some instances the administrative law judge will order additional medical evidence after the hearing; if this is done, the claimant must be given the opportunity to rebut or respond to that evidence before the record is closed for decision.[80]

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[71] 20 C.F.R. § 404.929. Claimants can waive this right, but the waiver must be made knowingly and intelligently. *See, e.g.*, Thomas v. Schweiker, 557 F.Supp. 580, 582 (S.D. Ohio, 1983). "However, a personal appearance is considered to be of sufficient importance that an administrative law judge can insist upon a claimant being present even when there has been a prior valid waiver." Stoner v. Secretary of Health and Human Services, 837 F.2d 759, 761 (6th Cir. 1988) (citing 20 C.F.R. § 404.950(b)). Further, counsel cannot waive the right to appearance unless given the authority by the claimant. *Id.*

[72] 20 C.F.R. § 404.948(a).

[73] *See, e.g.*, Embrey v. Bowen, 849 F.2d 418 (9th Cir. 1988) (hypothetical that is not supported by the record and is flatly contradicted by claimant and claimant's physician "has no evidentiary value and cannot support the [administrative law judge's] decision"). *See also* Brenem v. Harris, 621 F.2d 688, 689-90 (5th Cir. 1980).

[74] *See* Pugh v. Bowen, 870 F.2d 1271, 1278 n.9 (7th Cir. 1989) ("In cases where it is not possible to infer [the proper determination from] . . . the medical evidence . . . the administrative law judge should call on the services of a medical advisor").

[75] *See, e.g.*, 870 F.2d 742, 744 (1st Cir. 1989) (medical advisor's testimony accepted because, among other reasons, he was subject to a cross-examination).

[76] *See, e.g.*, Quiles v. Califano, 460 F.Supp. 110, 112 (E.D. Wis. 1978).

[77] 20 C.F.R. § 404.1512(a).

Following the closing of the record, the administrative law judge makes his or her decision on the merits. The decision must be communicated to the claimant in writing with a full statement of findings of fact and reasons for the decision.[81] Judges are required to include specific findings on weight given to conflicting evidence and on the credibility of witnesses.[82] The decision "must let the parties and the reviewing courts know, in some intelligible fashion, where they stand on the pivotal issues of fact posed by the applications they adjudicate."[83]

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[78] *See id* § 404.950(c). *See also* Sherill v. Bowen, 835 F.2d 166, 169 (8th Cir. 1987) (as long as the evidence is material to the issues in question, it may be considered by the administrative law judge, even if inadmissible under the rules of evidence in a court of law).

[79] *See* Richardson v. Perales, 402 U.S. at 402 (1971).

[80] Thus, an administrative law judge cannot rely on a medical report received after the hearing without giving the claimant an opportunity to rebut that evidence. *See, e.g.*, Allison v. Heckler, 711 F.2d 145, 147 (10th Cir. 1983). *See also* Wallace v. Bowen, 855 F.2d 101, 108 (3d Cir. 1988) (When the administrative law judge chooses to allow evidence after the hearing, he or she must "afford the claimant not only an opportunity to comment and present evidence but also an opportunity to cross-examine the authors of any post-hearing reports, and must reopen the hearing for that purpose if requested").

[81] 20 C.F.R. § 404.953(a). *See also* Burnett v. Bowen, 830 F.2d 731, 736 (7th Cir. 1987) ("[the administrative law judge's] failure to comment on the appellant's evidence leaves this court with a record insufficient for a meaningful appellate review . . . [To] ensure meaningful review at least a minimum level of articulation of the [administrative law judge's] assessment of the evidence is required").

[82] Making credibility determinations "is a difficult job, and . . . errors are obviously difficult for the reviewing court to detect . . . [thus a reviewing court] will not normally substitute [its] impressions on the veracity of a witness for those of the trier of fact." Gooch v. Secretary, 833 F.2d 589, 592 (6th Cir. 1987).

[83] Chiappa v. Secretary, 497 F.Supp. 356, 358 (S.D.N.Y. 1980). Although the administrative law judge decides the claim, the decision itself is usually written by staff attorneys rather than the judge.

2. Hearings in Other Programs

Procedures for initiating an administrative hearing tend to be more extensive in other programs. Although the role of the administrative hearing in the administrative appeals process is essentially the same in all programs, except, to some extent, in the Veterans program, there are significant differences in the manner in which hearings are held. In the Civil Service and Black Lung Programs, where, as in the Social Security program, administrative hearings are *de novo* reviews of final agency decisions, the process is somewhat more formal. In both of these programs this could result from the fact that administrative hearing decisions are subject to significant further administrative review.[84] In the case of the Black Lung program, the hearing process is a great deal more complex in part because hearings are adversarial.[85] Veterans hearings can serve slightly different functions from those in other programs, and are also subject to a more comprehensive final administrative review procedure.[86] The Railroad Retirement program, on the other hand, follows essentially the same procedures used in Social Security hearings, except that referees are used rather than administrative law judges and they never call medical experts to testify.[87]

The process begins in Civil Service disability retirement claims with a filing of a petition for appeal with the Merit Systems Protection Board.[88] The claimant has the option of requesting a hearing as part of the appeal; if a hearing is not requested the appeal will be decided solely on the documentary evidence in the record.[89] Although the Board's regulations require that a claimant include a statement of the basis of the appeal, under most circumstances failure to do so can be remedied later in the proceedings.[90]

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[84] *See* text accompanying notes 183-241, *infra*.

[85] Civil Service disability hearings can be described as somewhat adversarial. *See* text accompanying notes 102-104, *infra*.

[86] Some Veterans benefits hearings are held before a final agency level decision is made. *See* text accompanying notes 142-44, *infra*.

[87] *See generally* 20 C.F.R. §§ 260.5 (1988).

[88] 5 C.F.R. § 1201.22(a) (1988). The appeal must be filed within 20 days after the date of the Office's final decision. *Id.* § 1201.22(b).

[89] *Id.* § 1201.24(e). *See* Sweat v. Office of Personnel Management, 40 M.S.P.R. 84, 89 (1989) ("Applicant's right to a hearing on appeal may only be waived by implication if there is a clear, unequivocal and decisive act showing such a purpose"). *See also* Beaudette v. Department of the Navy, 5 M.S.P.R. 394 (1981).

Unlike with Social Security appeals, the Office of Personnel Management is required to respond to a petition for appeal.[91] The Office's response must include "[a] specific response admitting, denying or explaining, in whole or in part, each allegation of the appellant's petition" as well as copies of all documents in the record.[92] In practice, the Office's responses are often minimal. Thus, the Office was found to have "substantially complied" with Board regulations when it submitted a case file and copy of the reconsideration decision as a response to a petition for appeal.[93] The Office may request a hearing in its response; however, it is not entitled to a hearing as a matter of right and therefore must provide a statement of reasons for the request.[94]

Appeals are held before administrative judges who conduct a *de novo* review of the record.[95] New and supplemental evidence may be submitted at the hearing; however, the judge will not consider proof of an entirely new basis for disability.[96] If evidence of a new condition is presented, the proper disposition is to deny the claim and await the filing of a new application based on the new condition.[97] Board procedures are designed to cover the full range of personnel issues it considers in addition to claims for retirement benefits. Thus, its procedures on fact development are similar to those available in general civil litigation.[98] Although most disability retirement cases do not require extensive use of these rules, the Office has been ordered to respond to interrogatories requesting a statement of the standards used to deny a claimant's application for benefits.[99] The Board also has authority to issue subpoenas based on a general showing of relevance and materiality, and the reasonableness of the scope of the request.[100] The technical rules of evidence do not apply; however, objections can be made on the grounds of relevance and materiality.[101]

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[90] *See* 5 C.F.R. § 1201.24(b) ("[f]ailure to raise a claim or defense in the petition shall not bar its submission later unless to do so would prejudice the rights of the other parties or substantially delay the proceedings").

[91] *Id.* § 1201.22(b). The Board serves a copy of the petition on the Office; and the Office has 15 days to respond. *Id.* § 1201.26(c).

[92] *Id.* § 1201.25(a)(3), .25(a)(4).

[93] *See* Miller v. Office of Personnel Management, 7 M.S.P.R. 469, 473 (1981).

[94] 5 C.F.R. § 1201.25(b).

[95] *See* Cook v. Office of Personnel Management, 31 M.S.P.R. 683, 686 (1986) ("In adjudicating disability retirement appeal, the Board is not limited to review of record before [the Office of Personnel Management], but is mandated to conduct a hearing if requested by appellant and to consider *de novo* all relevant evidence presented by both parties.") *See also* French v. Office of Personnel Management, 30 M.S.P.R. 503, 505 (1986).

[96] *See* Chavez v. Office of Personnel Management, 6 M.S.P.R. 404, 413, n.14 (1981) ("we do not consider . . . evidence relating to a totally different or additional medical condition which was never the subject of an appellant's application to OPM"). Thus, in Bilancia v. Office of Personnel Management, 8 M.S.P.R. 77, 78-79 (1981), the Board refused to consider a disability claim based on anxiety and depression when initially only physical grounds were presented as a basis for the application.

[97] Nulph v. Office of Personnel Management, 29 M.S.P.R. 79, 80-81 (1985).

Board procedures also contemplate that hearings before administrative judges will be adversarial. As noted earlier, the Office is expected to file its response to a claimant's petition for appeal. In addition, the Office must designate a representative to sign its response;[102] however, in most cases the Office is not represented at the hearing itself. Indeed, the Office has been criticized for its limited participation in defense of its disability retirement decisions before the Board.[103] Although the Office often does not appear at hearings, it will appear when an administrative judge holds a prehearing conference. In the past few years, administrative judges have been making greater use of the prehearing conference in order to limit the issues on the appeal and, in some cases, to resolve the matter without a hearing.[104]

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[98] For example, the Board has a set of discovery rules based on the Federal Rules of Civil Procedure. *See generally*, 5 C.F.R. §§ 1201.71-.75. These discovery provisions are construed liberally by the Board. *See, e.g.*, Johnson v. Dept. of the Treasury, 8 M.S.P.R. 170, 174 (1981) (all evidence that "assists in planning a case" is discoverable).

[99] *See* Julson v. Office of Personnel Management, 8 M.S.P.R. 178, 182-83 (1981).

[100] *See generally* 5 C.F.R. §§ 1201.81-.85. Subpoena requests are ruled upon by the administrative judge. *Id.* § 1201.81(c).

[101] *See generally*, 5 C.F.R. § 1201.62.

[102] *Id.* § 1201.25(a)(5).

[103] *See* U.S. General Accounting Office, Most Civil Service Disability Retirement Claims Are Decided Fairly, But Improvements Can Be Made (1983).

[104] *See generally* 5 C.F.R. § 1201.41(b)(12), .41(c)(1). *See also* D'Iorio v. Department of Housing and Urban Development, 34 M.S.P.R. 351, 354 (1987) ("The administrative judge acted fully within her authority in directing the parties to stipulate to facts not in dispute. [She] has the authority to 'hold prehearing conferences for the settlement and simplification of issues' . . . similar to the power a federal judge has . . . to order a pre-trial conference").

Hearings are held at various sites throughout the country.[105] The administrative judge must consider all evidence that is relevant and material, unless "unduly repetitious."[106] Thus, disability retirement decisions "must be based on the probative value of all the evidence, taking into account objective clinical findings, diagnoses and expert medical opinions, subjective evidence of pain and disability, and all evidence relating to the effect of the applicant's condition on his or her ability to perform in the grade or class of position last occupied."[107] The judge's role at the hearing is more limited than that of the administrative law judge at Social Security hearings. Thus, although the administrative judge is under a similar duty to decide all issues presented by the parties and not to dismiss an appeal because there is insufficient proof, the judge's obligation is to request the party to submit additional necessary evidence.[108] The parties are given time to file written arguments and to submit additional evidence identified at the hearing.[109] The administrative judge must then issue a written initial decision within 25 days after closing the record, which must include the disposition of the claim and specific findings of fact and conclusions, as well as reasons and bases for those findings and conclusions with respect to all material issues of fact and law presented by the record.[110] This requirement has been construed strictly by the Board in order to provide it with the information necessary to review the administrative judge's decision effectively.[111]

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[105] There is a list of 109 sites for hearings in the Board's 11 regions; in addition, a hearing can be held elsewhere "if good and sufficient reason is shown." *See* 5 C.F.R. § 1201.4(e), Appendix II and III to part 1201.

[106] 5 C.F.R. § 1201.62(a). *See* Bommer v. Department of Navy, 34 M.S.P.R. 543, 551 (1987) ("If all of the proffered evidence and testimony concerns only undisputed or otherwise immaterial matters, the administrative judge has the authority to exclude all of it").

[107] Livingstone v. Office of Personnel Management, 30 M.S.P.R. 335, 338 (1986) (*quoting* Chavez v. Office of Personnel Management, 6 M.S.P.R. 404, 423 (1981)).

[108] *See* 5 C.F.R. § 1201.41(b)(10). *See* Juve v. Office of Personnel Management, 33 M.S.P.R. 17, 20 (1987) ("the administrative judge should have directed [the Office of Personnel Management] to provide explanatory material to enable him to make the required finding of fact"). *See also* Mascol v. Dept. of Navy, 7 M.S.P.R. 565, 567 (1981). The judge has a similar obligation in cases submitted without a hearing. Rosenberg v. Commodity Futures Trading Commission, 7 M.S.P.R. 664, 666 (1981).

[109] 5 C.F.R. § 1201.57. A closing date is set by the administrative judge also if no hearing is held. *Id.* § 1201.58(b).

[110] *Id.* § 1201.111.

Administrative hearings in Black Lung disability cases are fully adversarial.[112] They are held either upon direct referral by the deputy commissioner adjudicating the claim or, following a decision by the deputy commissioner, upon request by any party to the claim.[113] A hearing request must be made in writing, and must include the contested issue of fact or law.[114] When a claim has been filed, all relevant material from the claims file is forwarded to the Department of Labor's Office of Administrative Law Judges.[115] Although there is a set of general rules of practice and procedure for administrative hearings conducted by the Office of Administrative Law Judges,[116] there are separate regulations applicable only to Black Lung hearings which govern most procedures in Black Lung appeals.[117]

Administrative law judges conduct a *de novo* review of the record in Black Lung cases.[118] The administrative law judge is under no affirmative duty to seek out, or even receive, all relevant and material evidence.[119] The formal rules of evidence and procedure do not apply.[120]

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[111] Thus, the Board has held that "an initial decision must identify all material issues of fact, summarize the evidence on each issue sufficiently to disclose the evidentiary basis for the presiding official's findings of fact, set forth those findings clearly and explain how any issues of credibility were resolved and why, describe the application of burdens of proof, and address all material legal issues in a fashion that reveals the [administrative judge's] conclusions of law, legal reasoning and the authorities on which that reasoning rests." Maimone v. Dept. of the Navy, 7 M.S.P.R. 406, 407 (1981), *quoting* Spithaler v. Office of Personnel Management, 1 M.S.P.R. 587 (1980).

[112] A party at the hearing is entitled to be represented and advised by counsel, and must be given a reasonable opportunity to secure that right. A denial of this right is a violation of due process. *See* Johnson v. Director, 9 BLR 1-218, 1-220 (1986).

[113] 20 C.F.R. § 725.450 (1988). Parties include, in addition to the claimant, the Department of Labor and, if applicable, the responsible coal mine operator, the operator's insurer and other potential prior and successor operators. *Id.* § 725.360.

[114] *See id.* § 725.451.

[115] *Id.* § 725.421.

[116] *See* 29 C.F.R. §§ 18.1-.59 (1988).

[117] *See* 20 C.F.R. §§ 725.450-483.

[118] *See generally id.* § 725.455(b).

[119] McFarland v. Peabody Coal Company, 8 BLR 1-163, 1-165 (1985) (administrative law judge acted within his discretion in not allowing important blood test to be admitted when it was improperly obtained).

[120] Thus, the Federal Rules of Evidence "are not intended to apply to administrative hearings such as those held under the Black Lung Benefits Act." American Coal Co. v. Benefits Review Board, 738 F.2d 387, 390 (10th Cir. 1984). Separate Rules of Evidence have been proposed for Department

Documents and witness testimony are admitted freely, and hearsay evidence is admissible so long as it is reasonably reliable and probative.[121] Relevancy is the critical issue regarding the admissibility of evidence, including written medical reports.[122] Any party, including the Department of Labor, can be represented at the hearing, and although any party can waive its right to appear, the hearing can proceed even if all parties fail to appear if the administrative law judge still wishes to hear testimony.[123]

There are special rules concerning the admission of medical reports due to the technical nature of medical evidence in Black Lung cases. Thus, medical reports cannot be submitted at a hearing unless sent to all parties at least twenty days before the hearing.[124] This twenty-day rule can be waived, however, if no objection to the evidence is made at the hearing.[125] Moreover, the judge can waive the rule upon a showing of "good cause" so long as the record is kept open at least thirty days after the hearing to allow for submission of rebuttal evidence.[126] When late evidence is admitted, the ordering of a related post-hearing examination of the claimant may be appropriate as well.[127] Parties are free to submit any new evidence developed subsequent to the adjudication of the claim by the deputy commissioner; however, generally evidence will not be allowed to be submitted at a hearing if it was available but not submitted while the claim was pending before the deputy

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of Labor administrative law judges, but they would not apply to Black Lung claims. *See* 54 Fed. Reg. 2,310 (1989).

[121] 20 C.F.R. § 725.456. *See generally* Republic Steel Corp. v. Leonard, 635 F.2d 206, 208-09 (3rd Cir. 1980). As the Board stated in its decision in *Leonard*, "any evidence which has probative force and tends to prove or disprove a material fact is generally admissible in hearings." Leonard v. Republic Steel Corp., 2 BLR 1-571, 1-577 (1979). *See also* 29 C.F.R. § 18.44(b).

[122] Peabody Coal Co. v. Helms, 859 F.2d 486, 489 (7th Cir. 1988). Thus, in Evosevich v. Consolidation Coal Company, 789 F.2d 1021, 1025 (3d Cir. 1986), the court considered the issue of whether the report of a non-examining physician represented inadmissible hearsay and concluded that such hearsay evidence is admissible "up to the point of relevancy" in administrative proceedings.

[123] *See* 20 C.F.R. § 725.461.

[124] *Id.* § 725.456(b)(1) (1988). The exchange of documentary evidence twenty days prior to a hearing is required only among parties to the claim, and not to the administrative law judge. Luketich v. Director, 8 BLR 1-477, 1-479 (1986).

[125] *See* Hoffman v. Peabody Coal Company, 4 BLR 1-52, 1-58 (1981).

[126] 20 C.F.R. § 725.456(b)(2). *See* Buttermore v. DuQuesne Light Co., 8 BLR 1-36 (1985). The Board has declined to require an administrative law judge to make a specific finding that good cause did not exist to apply the twenty day rule as written. *See* Jennings v. Brown Badgett, Inc., 9 BLR 1-94, 1-96 (1986).

[127] *See* Horn v. Jewell Ridge Coal Corp., 6 BLR 1-933, 1-936-37 (1984).

commissioner unless "extraordinary circumstances" would warrant admission of the evidence at the hearing.[128] Witnesses can be summoned to hearings and, if summoned, are entitled to witness fees.[129] Written notice of the intention to present an expert witness must be provided at least ten days before the hearing.[130]

The issues at the hearing are limited to those set forth by the deputy commissioner, and any other issue raised in writing at the time the claim was pending before the deputy commissioner.[131] The only exceptions are issues "not reasonably ascertainable" when the claim was being adjudicated by the deputy commissioner.[132] If a new issue is presented at the hearing and accepted by the administrative law judge as appropriate, the judge can either remand the claim for determination of the new issue by the deputy commissioner or resolve the new issue at the hearing.[133] With respect to issues properly presented, the administrative law judge is under a duty "to develop fairly all sources of evidence," particularly when a claimant is unrepresented and does not have the capacity to handle the case adequately.[134] This duty is similar to that established for administrative law judges in Social Security adjudications; however, unlike with Social Security cases, the administrative law judge in Black Lung cases cannot order new medical examinations.[135]

The administrative law judge may allow parties to present oral argument and written memoranda.[136] The judge may also allow additional evidence to be submitted after the hearing, but is under no obligation to do so if the evidence could have been presented at the hearing.[137] The record is considered closed when all evidence has been compiled, including a written transcript of the hearing, and all memoranda have been filed.[138] The administrative law judge then issues a written decision and order based on the evidence in the record, including findings of fact and conclusions of law.[139] The Benefits Review Board has held that the administrative hearings decision must be sufficiently detailed to allow for effective review.[140] A party may seek reconsideration of a hearing decision within the time period for filing an appeal with the Benefits Review Board.[141]

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[128] 20 C.F.R. § 725.456(d).

[129] *Id.* § 725.459(a). These fees must be paid by the party requesting the witness; however, these fees can be recovered from a responsible coal mine operator if the claimant is found eligible for benefits. *Id.*

[130] *Id.* § 725.457(a). This requirement can be waived only by consent of all of the parties. *Id.*

[131] *Id.* § 725.463(a).

[132] *Id.* § 725.463(b). This rule is applied equally to claimants and the Department. Thus, in a recent case the Board reversed a decision of an administrative law judge who allowed the Department to litigate matters that were raised "at the last possible moment" without the Department presenting an "excuse for [its] inaction." Thornton v. Director, 8 BLR 1-277, 1-279 (1985).

[133] 20 C.F.R. § 725.463(b).

[134] *See* Laughlin v. Director, 1 BLR 1-488, 1-493 (1978). *See also* York v. Director, 5 BLR 1-833, 1-838 (1983).

[135] *See* York v. Director, 5 BLR at 1-839-840.

[136] 20 C.F.R. § 725.459A.

The procedures for a hearing at the Veterans Benefits Administration are unusual in that a veteran may request a hearing either before or after an initial determination on eligibility for benefits is made.[142] This first opportunity for a hearing is really part of the initial decision making process. Until recently, the Rating Board held hearings itself, whether requested before or after an initial determination was made; however, beginning in late 1988, hearings requested following an adverse initial determination by the Ratings Board are heard by a separate hearing officer.[143] Hearings before the Rating Board prior to the issuance of an initial determination or by a hearing officer following a Rating Board determination are both optional. A claimant may, therefore, appeal an adverse

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[137] *See* Hoffman v. Peabody Coal Company, 4 BLR 1-52, 1-54-59 (1981). In *Hoffman*, the Board indicated that evidence known at the hearing but unavailable should be admitted. *Id.* at 1-54-55.

[138] 20 C.F.R. § 725.475.

[139] *Id.* § 725.477. The decision and order is to be filed within twenty days after the last evidence is received. *Id.* § 725.476.

[140] *See, e.g.*, Kendrick v. Kentland-Elkhorn Coal Corp., 5 BLR 1-730, 1-731 (1983) (A decision is acceptable if it is "from context or otherwise, . . . possible to discern the reasoning of the administrative law judge and to determine the existence of substantial evidence to support that reasoning"). *See also* Peabody Coal Co. v. Hale, 771 F.2d 246, 249 (7th Cir. 1985) ("if this Court is to perform its function of review . . . more than unexplained conclusions and findings [by the administrative law judge] are necessary, where, as here, the case involves significant conflicting evidence").

[141] 20 C.F.R. §§ 725.479(b), .481. If reconsideration is requested, a notice of appeal can be filed with the Benefits Review Board within thirty days of disposition of the reconsideration request. *Id.* § 725.479(c).

[142] *See* 38 C.F.R. § 3.103(c) (1988) (A hearing can be requested "at any time on any issue").

[143] *See* Department of Veterans Affairs, Veterans Benefits Administration DVB Circular 20-89-11 (March 23, 1989) [hereinafter DVB Circular 20-89-11].

Rating Board decision directly to the Board of Veterans Appeals without first requesting a hearing.[144]

Most hearings at the Veterans Benefits Administration are requested by claimants following an initial determination rather than prior to the Rating Board's initial decision.[145] As noted earlier, the initial decision is transmitted to the claimant through a Notice of Decision. Most post-decision requests for hearings are filed with an appeal from an adverse Notice of Decision, which is initiated by filing a "Notice of Disagreement."[146] The claimant is expected to set out disagreements with the conclusions of law or fact contained in the Notice of Decision; however, the Notice of Disagreement "need not contain specific allegations of error, of fact or law" and must be processed even if "the claimant's contentions may appear to have no merit."[147] A Notice of Disagreement will be effective so long as it "can be reasonably construed as a desire for review."[148]

The Veterans Benefits Administration can respond to a Notice of Disagreement in one of three ways. It may develop the record further and, on the basis of the more fully developed record, review its initial decision; it may review its decision without further development; or, it may decide that no further development or review is necessary.[149] If the Administration decides to affirm the initial decision, with or without further development and review, it must issue a new justification of the decision in the form of a "Statement of the Case."[150] The Statement of the Case is the last action taken by the Administration before an appeal can be filed with the Board of Veterans Appeals, unless a hearing is requested. Its purpose is to give the claimant sufficient information to understand the basis for the decision and to allow the claimant to prepare for an effective appeal.[151] Specifically, a Statement of the Case must include a summary of the evidence relevant to the issues in dispute, a summary of the law and regulations applicable to the case, including appropriate citations, and a statement of the reasons for the decision reached on each issue raised in the case.[152] If a hearing request was filed with the Notice of Disagreement, the Statement of the Case is written to frame issues for the hearing; otherwise, it is written to frame issues for an appeal to the Board of Veterans Appeals.

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[144] Although the Board of Veterans Appeals may in such cases be seen as a first level administrative hearing, it operates more like a final administrative review panel and therefore is discussed together with similar panels in other programs at text accompanying notes 160-275, *infra*.

[145] When hearings are held before the Rating Board makes its initial decision, the hearing is more in the nature of a face-to-face interview and therefore not really part of the appeals process.

[146] 38 C.F.R. §§ 19.127, 19.118. The Notice of Disagreement must be filed within one year after the date on which the Notice of Decision was mailed to the claimant. *Id.* § 19.129. If a Notice of Disagreement is not filed within a year, the initial decision becomes final. *Id.*

[147] Veterans Administration Manual M21-1 § 18.03(a).

[148] 38 C.F.R. § 19.118. Moreover, it "need not be expressed in any special wording." *Id.*

[149] *See id.* § 19.119.

[150] *Id.* § 19.119(b).

A hearing requested following the issuance of an adverse Notice of Decision is held by a hearing officer for the purpose of supplementing the evidentiary record compiled and considered by the Rating Board. The hearing officer's duties include reviewing the existing record and evaluating the need for additional evidence, holding an evidentiary hearing, and issuing a decision on the hearing record.[153] The hearing officer has the authority to order additional evidence, including a medical examination at a Department of Veterans Affairs medical facility.[154] The hearing is to cover only issues raised in the Notice of Disagreement; new issues are to be referred back to the Rating Board for evaluation.[155] The hearing officer may request that adjudication staff, including a medical member of the Rating Board, be present at the hearing.[156] Following the hearing, the hearing officer prepares a decision which includes a revised statement of reasons for the determination based on the supplemented record.[157] The claimant is then notified of the decision by the authorization unit in a separate document.[158] If a hearing was held prior to the filing of a Notice of Disagreement, then the claimant can file a Notice of Disagreement from the hearing decision. The Administration will then prepare a Statement of the Case. If a Notice of Disagreement was filed and a Statement of the Case was prepared before the hearing, then a Supplemental Statement of the Case is prepared on the basis of the hearing decision.[159]

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[151] Veterans Benefits Administration Manual M21-1 § 18.07(a). *See also* 38 C.F.R. § 19.120(a) (Statement of the Case "should be complete enough to allow the appellant to present written and/or oral arguments before the Board of Veterans Appeals").

[152] *Id.* § 19.120(b). Under certain circumstances, a supplemental statement may be filed. *Id.* § 19.122.

[153] *See* DVB Circular 20-89-11, *supra* note 143.

[154] *Id.*

[155] *Id.*

[156] *Id.* The final decision, however, is left entirely to the hearing officer. *Id.*

[157] The decision must follow a prescribed form. *See id.*

[158] *Id.* The authorization must, however, implement the decision of the hearing officer, unless the Regional Office Adjudication Officer initiates an Administrative Appeal. This happens only rarely. *See generally* 38 C.F.R. §§ 19.138-.142.

D. Post-Hearing Administrative Review

All of the programs included in this study provide for a final administrative appeal after an administrative hearing. In all programs a claimant must pursue the final administrative review process as a precondition to judicial review. There are significant differences, however, in the role established for the final administrative review process in the various programs. The most important areas of difference include the treatment of additional evidence and the scope of review.

1. Social Security Appeals Council

The Social Security Administration's Appeals Council reviews decisions of administrative law judges either upon the request of a claimant or on its own motion.[160] A request for review may be filed at one of the Social Security Administration offices within sixty days of receipt of the hearing decision.[161] A request for review is made on a standard form, which includes space for a statement of the reasons for the request.[162] The Appeals Council may dismiss a request for review under limited circumstances;[163] otherwise, the Council must either grant or deny the request for review and then, if it grants the request for review, either issue a decision or remand the case for further administrative action.[164]

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[159] DVB Circular 20-89-11, *supra* note 143. It is also possible that the claimant will initiate an appeal to the Board of Veterans Appeals during this period, in which case the hearing officer acts under slightly restricted authority as an agent of the Board. DVB Circular 20-89-11, Change 1 (April 10, 1989).

[160] *See* 20 C.F.R. §§ 404.968, .969 (1988). At one point decisions of administrative law judges with unusually high numbers of favorable decisions or low levels of productivity were "targeted" for review by the Appeals Council on its own motion. This practice, which was subject to much criticism has been abandoned; currently, most cases reviewed on the Council's own motion are selected at random. *See* Ass'n of Administrative Law Judges v. Heckler, 594 F.Supp. 1132 (D.D.C. 1984).

[161] 20 C.F.R. §§ 404.968(a). The time limit can be extended for good cause. *Id.* § 404.968(b).

[162] Thus, the current form, HA-520-U6, includes the same statements as the form requesting an administrative hearing. *See* note 60, *supra.*

[163] For example, a request can be dismissed because it was filed too late. 20 C.F.R. § 404.971.

The Appeals Council acts as an appellate body over the administrative law judges, and therefore does not hear claims *de novo*.[165] The Council will grant a request for review on one of four bases: if there was an abuse of discretion by the administrative law judge, an error of law in the hearing decision, a lack of substantial evidence supporting the decision, or if the decision presents "broad policy or procedural issues that may affect the general public interest."[166]

There is a split among the courts of appeals on the requirement of notice by the Appeals Council if it intends to review the entire record in a disability case, even though the claimant only requested review of one aspect of the administrative law judge's decision. The Third Circuit has held that review initiated by the Appeals Council requires the same notice as a request for review by a claimant, which means that it must notify the claimant of its intention to review the claim within sixty days of hearing decision or dismissal.[167] The Eleventh Circuit agrees with the Third Circuit on the requirement of notice; however, it has not addressed the question of whether the notice must be given within the sixty-day time period.[168] Two circuits disagree with the requirement of notice altogether. The Sixth and Seventh Circuits hold that the additional requirement of notice by the Appeals Council is a pointless redundancy for two reasons: first, the claimant initiated the appeal; and, second, partially successful claimants cannot foreclose review of their cases by simply refusing to appeal.[169]

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[164] *See id.* § 404.967.

[165] Thus, if the Appeals Council makes a finding that is contrary to a credibility finding of the administrative law judge, the Appeals Council must fully articulate its reasons for disagreement and those reasons must be supported by substantial evidence in the record. Smith v. Bowen, 849 F.2d 1222, 1226 (9th Cir. 1988). The Council can assess objective medical evidence more independently. *See* Dupuis v. Secretary, 869 F.2d 622, 623-24 (1st Cir. 1989).

[166] 20 C.F.R. § 404.970(a). The authority of the Appeals Council to review is plenary; several courts have ruled that the Appeals Council may review an administrative law judge's decision regardless of whether regulatory grounds for review were met. *See e.g.*, Fierro v. Bowen, 798 F.2d 1351, 1354 (10th Cir. 1986), *cert. denied*, 480 U.S. 945 (1987); Duda v. Secretary, 834 F.2d 554, 556 (6th Cir. 1987) ("[regulations] do not limit Appeals Council's power to review . . . but rather set out the situations where the Appeals Council *must* review the [administrative law judge's] decision").

[167] *See* Kennedy v. Bowen, 814 F.2d 1523, 1527 (11th Cir. 1987).

[168] *See* Powell v. Heckler, 789 F.2d 176, 180 (3d Cir. 1986).

Ordinarily, new evidence cannot be submitted to the Appeals Council unless it is material.[170] The evidence must relate to the period on or before the date of the administrative hearing decision.[171] In practice, however, the Council has been quite lenient in considering new evidence submitted by claimants.[172] The Council will consider this evidence, as well as other evidence that was overlooked by the agency or the administrative law judge, in deciding whether to remand a claim for further factual development.[173] If the new evidence relates to a condition that arose only after the administrative hearing record was closed, or to a deterioration of a condition that occurred only after the record was closed, the Appeals Council cannot consider that evidence.[174] Recognizing that often it is difficult to categorize a piece of medical evidence as relating solely to a new condition or post-hearing deterioration, the Council has tended to consider evidence that arguably covers the relevant time period; however, if the new evidence clearly falls outside that period, it is returned to the claimant with instructions to file a new application.[175]

In practice, the Appeals Council rarely grants a request for review. Although the Council may hear oral arguments in cases which raise important issues of law or policy, when it does grant review it usually issues a new decision or remand order at the same time. The Appeals Council has been criticized recently in a recent Administrative Conference study as an ineffective appellate tribunal.[176]

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[169] *See* Delong v. Heckler, 771 F.2d 266, 268 (7th Cir. 1985); Gronda v. Secretary, 856 F.2d 36, 38 (6th Cir. 1988).

[170] *See* 20 C.F.R. § 404.970(b).

[171] *Id.* § 404.976(b). A specific showing of good cause for presenting new evidence at the Appeals Council level is not required. Cummings v. Bowen, 677 F.Supp. 975, 979 (N.D. Ill. 1988). The Social Security Administration proposed in 1983 that the Appeals Council would not be able to consider any evidence submitted after the issuance of a hearing by an administrative law judge. *See* 48 Fed. Reg. 21,967 (1983). This was in response to Pub. L. No. 96-265 § 306, which foreclosed the introduction of evidence that occurred after the decision of the administrative law judge. The Administration received many comments supporting the submission of evidence for good cause at the Appeals Council level. 52 Fed. Reg. 4003 (1987). In response, it promulgated the rule allowing evidence to be submitted to the Appeals Council if it is material and if it relates to the period before the decision of the administrative law judge. *Id.*

[172] *See* Koch and Koplow, A Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council 108-10 (Administrative Conference of the U.S. 1987).

[173] *See* 20 C.F.R. § 404.977.

[174] This requirement was included in 1980 amendments to the Social Security Act and implemented by regulation for claims filed after May, 1986. *See* 42 U.S.C. § 402(j)(2) (1982); 52 Fed. Reg. 4004 (1987).

[175] *See* Koch & Koplow, *supra* note 172, at 109-10; 20 C.F.R. § 404.976(b).

A decision by the Appeals Council dismissing a request for review, denying a request or, following the granting of a request for review, to affirm, modify or reverse the hearing decision is a final decision by the Social Security Administration subject to judicial review.[177] If the Council remands the claim an administrative law judge will make a new decision which itself will be appealable back to the Appeals Council.

2. Final Administrative Review in Other Programs

Final administrative review of disability adjudications tends to be more extensive and thorough in other programs than in the Social Security program. This is true in part because the numbers of cases appealed to the final administrative level are substantially less, except at the Board of Veterans Appeals which also hears more than 40,000 cases per year.[178] Another reason is that judicial review, when available, is only to the United States courts of appeals, as opposed to the district courts in the Social Security program.[179] Also, the decision of two final administrative appeal boards, the Merit Systems Protection Board and the Benefits Review Board, are published and given full precedential effect.

As in the case with other levels of administrative appeal, the final administrative appeal procedure in the Railroad Retirement program is most like that of the Social Security Appeals Council. This function is performed by the Railroad Retirement Board.[180] Although the Board may consider new evidence, it rarely does so; instead, it will usually relies on the record developed by the referee at the hearing. The Board has authority to affirm or reverse the decision, and to remand the claim to the referee or Bureau of Retirement Claims for appropriate action.[181] A decision by the Board is a precondition for judicial review in the federal courts of appeals.[182]

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[176] The study and the Conference's recommendations following the study are discussed in detail at text accompanying notes 329-42, *infra*.

[177] *See* 20 C.F.R. § 404.981.

[178] *See* Appeals Statistical Data -- Board of Veterans Appeals, (May 1989).

[179] Currently, there is no judicial review from decisions of the Board of Veterans Appeals; however, effective in Fall, 1989, judicial review will be available in a new Article I Court of Veterans Appeals. *See* text accompanying note 245, *infra*.

[180] *See* 20 C.F.R. § 260.9 (1988).

Appeals from administrative hearing decisions in Civil Service Disability Retirement cases are heard by the Merit Systems Protection Board.[183] There are three members of the Board, including a chair and a vice chair.[184] As noted earlier, the Board also has the formal responsibility for providing administrative hearings which are held by administrative judges.[185] The Board hears appeals from all types of cases decided by administrative judges; indeed, the majority of the Board's case load involves federal personnel issues rather than claims for disability retirement benefits.

The Merit Systems Protection Board reviews administrative judge decisions in a manner similar to that of the Appeals Council, except that the grounds for review are somewhat more limited. A petition for review must be filed within thirty-five days after the administrative hearing decision was issued.[186] In addition, the Board has broad authority to reopen an administrative judge's decision even after it has become final; however, this power is exercised rarely and only under extraordinary circumstances.[187] Thus, the Board reopened a case to decide whether a Court of Appeals decision overruling the basis for the previous decision should be applied retroactively.[188] As is the case with Social Security disability appeals, a claimant for Civil Service disability retirement benefits must petition the Board for review of the administrative judge's decision as a precondition of judicial review.[189] Judicial review is available in the federal Court of Appeal for the Federal Circuit.[190]

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[181] *Id.* § 260.9(e).

[182] Appeals are heard in the United States courts of appeals for the Seventh Circuit, the District of Columbia Circuit or the circuit where the claimant lives. *See* 45 U.S.C. §§ 231g, 355f (1982, Supp. IV 1986).

[183] 5 U.S.C. §§ 7701, 8347(d) (1988); 5 C.F.R. § 1201.3(a).

[184] *Id.* § 1200.1, .2. Members are appointed by the President and serve for a period of seven years. *Id.* § 1200.1.

[185] *See* text accompanying notes 142-44, *supra.*

[186] 5 C.F.R. § 1201.114(d).

[187] *See id.* § 1201.117; Dawson v. Merit Systems Protection Board, 712 F.2d 264, 266-67 (7th Cir. 1983).

[188] *See* Stephens v. Office of Personnel Management, 30 M.S.P.R. 680, 681-82 (1988).

[189] *See* 5 C.F.R. § 1201.116(b), .118, .119.

There are two grounds for reviewing a hearing decision in Civil Service disability benefits cases: when "[n]ew and material evidence is available that, despite due diligence, was not available when the record was closed," and when "[t]he decision of the presiding official is based on an erroneous interpretation of statute or regulation."[191] A petition for review must set forth objections to the hearing decision "supported by references to applicable law or regulations, and with specific reference to the record."[192] Although the Board does not always adhere strictly to this requirement of specificity,[193] it does require some statement as to why the administrative judge erred in rejecting the claimant's arguments at the hearing.[194]

The Board has construed the "new and material" evidence ground for review to cover only information not available before the record was closed at the administrative hearing.[195] Thus, a claimant cannot cure on a petition for review a claim that was documented poorly at the hearing. Likewise, a claimant may not submit information on a medical condition that a physician failed or refused to provide during the hearing.[196] On the other hand, medical evidence of a deterioration in the claimant's condition or the emergence of a new symptom only after the record was closed can be a basis for review.[197] The rule has been relaxed somewhat to allow the submission of evidence not generally available at the time of the hearing, or which was not introduced because the claimant had reason to believe that it was or would be included in the record.[198] Even if the evidence is new, it must "be of sufficient weight to warrant a finding different from that in the initial decision."[199]

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[190] *See* 5 U.S.C. § 7703(a)(1), (b)(1) (1982); Lindahl v. Office of Personnel Management, 470 U.S. 768 (1985).

[191] 5 C.F.R. § 1201.115.

[192] *Id.* § 1201.115.

[193] *See, e.g.*, Vosetpka v. Office of Personnel Management, 7 M.S.P.R. 177, 178 (1981).

[194] *See* Rasheed v. Department of the Air Force, 6 M.S.P.R. 524, 526 (1981).

[195] Stallivlere v. Office of Personnel Management, 31 M.S.P.R. 647, 648 n.2 (1986) ("The Board will not consider [evidence] raised for the first time in [a] petition for review absent a showing that such arguments are based on new and material evidence that, despite due diligence was not available prior to closing of record"). Thus, documentation of a diagnosis that could have been made at the time of the hearing is not a basis for review. Frazier v. Office of Personnel Management, 7 M.S.P.R. 428, 430 (1981). *See also* Nathan v. Office of Personnel Management, 15 M.S.P.R. 359, 361 (1983) (Subjective evidence of pain that was not presented at the hearing not a basis for review).

[196] *See* Pecukonis v. Office of Personnel Management, 34 M.S.P.R. 411, 415 (1987).

[197] *See, e.g.*, Paolera v. Office of Personnel Management, 7 M.S.P.R. 581 (1981) (Report of infarction which occurred after record closed considered new evidence); Robinson v. Office of Personnel Management, 21 M.S.P.R. 744 (1984) ("new evidence" requirement met where doctor was incapacitated at the time of the hearing and therefore was unable to prepare a report).

The "erroneous interpretation of statute or regulation" ground for review is intended to cover cases where the administrative judge applied an incorrect legal standard.[200] On the other hand, the Board will refuse to review cases challenging the administrative judge's "findings of fact, credibility determinations and interpretation of the evidence."[201] The Board defers to the administrative judge's credibility determinations only when the administrative judge fully sets forth the reasons for his or her findings.[202] The Board does consider a petition alleging that the administrative judge applied an improper standard of proof to amount to the application of an incorrect legal standard.[203] Thus, it has reviewed disability retirement cases if in its view the evidence was sufficient to establish disability according to the requisite standard of proof.[204]

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[198] *See, e.g.*, Waite v. Office of Personnel Management, 9 M.S.P.R. 533 (1982) (Claimant relied on Office of Personnel Management to submit a portion of the file after ordered to do so, but material not submitted).

[199] Janke v. Office of Personnel Management, 7 M.S.P.R. 140, 141 (1981). Thus, in Treptow v. Office of Personnel Management, 32 M.S.P.R. 387 (1987), even if a CT Scan could not have been done before an administrative judge's decision was issued, the fact that the claimant failed to show that report warranted a different outcome in the case precluded review of the case. *See also* Robinson v. Office of Personnel Management, 21 M.S.P.R. 744, 746 (1984) (doctor's report shown to easily meet the "new" requirement but not qualify as material because it only further documented the same information about claimant's medical condition).

[200] *See, e.g.*, Forde v. Office of Personnel Management, 7 M.S.P.R. 559, 560 (1981) (Reliance on case that had been overruled).

[201] Godfrey v. Defense Mapping Agency, 7 M.S.P.R. 338, 339 (1981). *See also* Cook v. Office of Personnel Management, 31 M.S.P.R. 683, 686 (1986) ("Special deference must be given to administrative judge's findings on credibility of witnesses").

[202] Addison v. Department of Treasury, 30 M.S.P.R. 615, 618 (1986). *See also* Macijaukas v. Department of the Army, 34 M.S.P.R. 564 (1987) ("[the] administrative judge's failure to state basis for finding the witness to be credible . . . warrants the Board's review").

[203] *See, e.g.*, Cope v. Department of the Navy, 7 M.S.P.R. 546, 548 (1981) ("A misapplication of the proper standard of proof [is] sufficient to warrant a review of the [administrative judge's] fact finding").

[204] *See, e.g.*, Wommack v. Office of Personnel Management, 7 M.S.P.R. 218 (1981).

Review will be denied, however, if the Board finds that errors were, in effect, harmless.[205]

When the Board decides to review a hearing decision, it may decide the case on the merits or remand the case for a further hearing or for further development by the Office of Personnel Management.[206] The Board reviews all of the evidence in the record, including admissible new evidence; however, the Board is likely to remand a case when new evidence indicates that other factual development may be necessary.[207] When it does undertake to review a decision, the Board considers itself "free to substitute its own determinations of fact for those of the [administrative judge], giving the [administrative judge's] findings only so much weight as may be warranted by the record and by the strength of the [administrative judge's] reasoning."[208] However, with respect to credibility determinations by the administrative judge, the Board will find otherwise only if the reasoning on which the administrative judge made the finding is considered erroneous.[209] The Board issues a written decision, which is a final decision subject to judicial review.[210]

The Board's decisions have been published since 1985 in the U.S. Merit Systems Protection Board Reporter.[211] Board decisions have precedential effect and are binding on the administrative judges who conduct administrative hearings on behalf of the Board. The Board has recognized, however, that its authority "is subordinate to that of [the] judicial system," and therefore it is bound by applicable federal court decisions.[212]

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[205] *See* Sears v. Office of Personnel Management, 33 M.S.P.R. 595, 598 (1987) ("administrative judge's procedural error is of no legal consequence unless it is shown that it has adversely affected a party's substantive rights"). *See also* Dooley v. Office of Personnel Management, 22 M.S.P.R. 577 (1984).

[206] 5 C.F.R. § 1201.116.

[207] *See, e.g.*, Paolera v. Office of Personnel Management, 7 M.S.P.R. 581, 582 (1981) (New evidence of heart condition insufficient to show extent of damage); Jolly v. Office of Personnel Management, 7 M.S.P.R. 507, 509 (1981).

[208] Chisolm v. United States Postal Service, 7 M.S.P.R. 116, 118 (1981).

[209] *See, e.g.*, Miller v. United States Air Force, 8 M.S.P.R. 204, 207 (1981). *Cf.* Payne v. Department of Health and Human Services, 6 M.S.P.R. 217, 220 (1981) ("The board must give due deference to the credibility assessments of the [administrative judge] who was present to hear and observe the demeanor of the three witnesses").

[210] 5 C.F.R. §§ 1201.116(b), .118.

[211] The Board published its decisions itself until 1985. The U.S. Merit Systems Protection Board Reporter, published by West Publishing Company, includes all pre-1985 decisions of the Board as well.

Administrative law judge decisions in the Black Lung program are reviewed in a similar manner by the Benefits Review Board.[213] Until 1984, the Board consisted of three members, including a chair and two associate members; in 1984, the membership was increased to five permanent members, together with authority for the appointment of up to four additional temporary members.[214] The Board is operating currently with five permanent and four temporary members. Cases are still decided, however, by panels of three members; in limited circumstances, the Board will rehear cases *en banc.*[215]

The process of initiating an appeal to the Benefits Review Board is somewhat more complicated and elaborate than with other programs, in part because of the number of different parties involved and the adversarial nature of the process. An appeal to the Board is commenced with the filing of a written notice of appeal.[216] The notice may be in any form so long as it "reasonably permits identification of the decision from which an appeal is sought."[217] The notice is served on all parties affected by the decision; the petitioner must then identify the substantive issues involved in the appeal by filing a petition for review within thirty days of receipt of acknowledgement of the notice of appeal.[218] The petition for review must include "a statement which specifically states the issues to be considered by the Board," and must be accompanied by a brief, memorandum of law, or other supporting statement.[219] The petition is served on all of the parties to the appeal, who then have thirty days to file a response.[220] An appellant may raise any issue; however, the Board will not consider new issues raised in responsive pleadings unless a prevailing party, in response to a petition, raises a new issue in support of the hearing decision.[221] The Board can refuse to consider an issue raised in a petition for review if it is not briefed adequately by the party raising the issue.[222] The Board will relax its formal procedures in this regard, however, when a petitioner is unrepresented[223] or when the issue involved "is basic to the proper administration of the act or to the rendering of justice in the individual case."[224]

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[212] *See* McAnallen v. Office of Personnel Management, 7 M.S.P.R. 616, 618 (1981). The Board has held that an unpublished Federal Circuit decision does not have precedential value in its proceedings. Averill v. Department of Navy, 30 M.S.P.R. 327, 330-31 (1986).

[213] *See* 30 U.S.C. § 932(a) (1982). The Benefits Review Board was established originally to hear appeals involving claims under the Longshore and Harbor Compensation Act; its authority to hear appeals in Black Lung cases is derived from a general incorporation of Longshore and Harbor Worker's Compensation Act procedures into the Black Lung Benefits Act.

[214] *See* Longshore and Harbor Workers Compensation Act amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639 (1984).

[215] *See* Borgeson v. Kaiser Steel Corp., 8 BLR 1-312 (1985).

[216] The notice must be filed at the Board's office in Washington within thirty days of the issuance of the decision, or the issuance of a decision disposing of a timely request for reconsideration. 20 C.F.R. §§ 802.205, .206 (1988). In a recent case the Board ruled that the standard upheld in the Third Circuit would be applied to all circuits, which dictates that the 30-day period begins to run on the date that the administrative law judge's decision is actually filed with the deputy commissioner's office. Harris v. Nacco Mining Company, 12 BLR 1-115, 1-116 (1989).

[217] 20 C.F.R. § 802.208(b). The parties affected must also be identified. *Id.*

[218] *Id.* § 802.211(a).

The Benefits Review Board is an appellate tribunal; it does not hear cases *de novo*.[225] The Board reviews findings of fact by administrative law judges according to a substantial evidence standard, using the traditional formulation of "more than a mere scintilla," or "evidence which 'a reasonable mind might accept as adequate to support a conclusion.'"[226] Thus, "[i]t is the administrative law judge's duty to weigh the evidence and make findings of fact. That the . . . [Board] might draw different inferences from the evidence is of no significance."[227] The evaluation of medical evidence is, for these purposes, a question of fact; it is the administrative law judge's responsibility to evaluate the credibility of medical evidence and the Board will defer to the administrative law judge's findings.[228] However, the administrative law judge must determine the credibility and consider the underlying basis of the evidence upon which he or she relies in the decision, and not just accept it at face value.[229] The Board will not receive new evidence. If the basis for an appeal is that the administrative law judge refused to consider certain evidence, the Board's usual practice is to remand the case for proper evaluation.[230] Indeed, the Board has been reversed for evaluating the sufficiency of a medical report ignored by the administrative law judge rather than remanding the case.[231]

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[219] *Id.* §§ 802.211(a), (b).

[220] *Id.* § 802.212. Any party receiving a response to a petition can then file a reply to the response within twenty days. Id. § 802.213.

[221] Pokorny v. U.S. Steel Corp., 6 BLR 1-67, 1-69 n.2 (1983). *See also* King v. Tennessee Consolidation Coal Company, 6 BLR 1-87, 1-90-91 (1983).

[222] *See* Wetherill v. Green Construction Company, 5 BLR 1-248, 1-251 (1982).

[223] *See generally* 20 C.F.R. § 802.220 ("The Board may prescribe an informal procedure . . . to be followed by . . . [an unrepresented] party"). *See also* Hurd v. Director, 5 BLR 1-106, 1-107 (1982).

[224] *Hurd*, 5 BLR at 107.

[225] *See* Parker v. Director, 590 F.2d 748, 749 (8th Cir. 1979) ("The [Board] does not have the authority to undertake a *de novo* review of the evidence . . . or to substitute its views for the administrative law judge"). As the Board stated in McCluskey v. Zeigler Coal Company, 2 BLR 1-1248, 1-1251 (1981), it is "an independent judicial tribunal with exclusive jurisdiction to consider and decide appeals raising substantial questions of law or fact under the Black Lung Benefits Act."

[226] Taranto v. Barnes and Tucker Company, 4 BLR 1-308, 1-310 (1981) (quoting Consolidated Edison Company v. NLRB, 305 U.S. 197, 229 (1938)). The Board's scope of review is defined by statute. Hoskins v. Shamrock Coal Company, 12 BLR 1-117, 1-118 (1989) (quoting O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965)).

[227] Hamilton v. The New River Company, 4 BLR 1-190, 1-195 (1981). *See also* Clark v. Director, 838 F.2d 197, 200 (6th Cir. 1988) ("The finding of an [administrative law judge] in a black lung case may not be set aside if it is based on substantial evidence viewing the record as a whole, even if we would have taken a different view of the evidence were we the trier of facts").

The Board also will review a hearing decision in order to assure that the decision is consistent with applicable law.[232] Although the Board gives deference to the Department of Labor's interpretation of its regulations, the Board takes the position that it may base its decision on its reading of both the constitution and the Black Lung Benefits Act.[233] The Board will respect decisions of the courts of appeals; however it considers itself bound only by the rulings of the circuit in which the case being decided was filed.[234] However, the Board may, in the interest of fairness and efficiency, rule that a standard used in one circuit be used in all circuits.[235]

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[228] *See* Micheletto v. Peabody Coal Company, 4 BLR 1-758, 1-759 (1982) (The administrative law judge "has great discretion" in evaluating the credibility of medical evidence).

[229] Addison v. Director, 11 BLR 1-68, 1-70 (1988). *See also* Ware v. Director, 814 F.2d 514, 516 (1987) (administrative law judge must view medical opinion "in light of studies conducted and the objective indications upon which the medical opinion or conclusion is based").

[230] *See, e.g.*, Swinney v. Director, 5 BLR 1-233, 1-234 (1983) ("If there were any evidence to support an award of benefits which the administrative law judge failed to consider, the Board normally would remand"). *See also* Defore v. Alabama By-Products Corporation, 12 BLR 1-27, 1-28 (1988) ("The regulatory criteria at [20 C.F.R.] § 718.204(c) require that the administrative law judge weigh all relevant probative evidence. [T]hus, on remand, the administrative law judge should consider . . . the other . . . evidence of record").

[231] *See* Director v. Rowe, 710 F.2d 251, 255 (6th Cir. 1983) ("The determination as to whether . . . [the medical] report was sufficiently documented and reasoned is essentially a credibility matter. As such, it is for the fact finder to decide").

[232] *See, e.g.*, Edwards v. Director, 6 BLR 1-265, 1-266 (1983). *See also* 33 U.S.C. § 921(b)(3) (1982); 20 C.F.R. § 802.301 The Board can set aside findings of fact and conclusions of law "only if they are not . . . supported by substantial evidence in the record considered as a whole or in accordance with law"). The Board will be reversed when it fails to limit its review to a finding of substantial evidence and instead attempts to substitute its own judgment on weight and sufficiency of evidence. *See* Zbosnik v. Badger Coal Co., 759 F.2d 1187, 1190 (4th Cir. 1985).

[233] *See* McCluskey v. Zeigler Coal Company, 2 BLR 1-1248, 1-1250 (1981) (constitutional interpretation); Jones v. The New River Company, 3 BLR 1-199, 1-208-209 (1981) (statutory interpretation). *See also* Kovalchick v. Rochester and Pittsburg Coal Company, 5 BLR 1-670, 1-673 (1983) (The Board is "not free to ignore the language of the statute"). The Board's authority to invalidate regulations on the basis of the act has been upheld by courts of appeal. *See, e.g.*, Gibas v. Saginaw Mining Company, 748 F.2d 1112, 1117-18 (6th Cir. 1984); Carozza v. United States Steel

The Board hears most cases without oral argument.[236] Although the Board may issue a summary decision where prior decisions of the Board or the administrative law judge's decision address all issues raised on the appeal, in most cases the Board must issue "a full, written decision discussing the issues and applicable law."[237] The Board may affirm, reverse, or otherwise modify the administrative law judge's decision, or may remand the case for further administrative proceedings.[238] A party may seek reconsideration of the Board's decision; however, a request for reconsideration is not required to exhaust administrative remedies and may be granted or denied at the discretion of the Board.[239] Generally, the Board will not consider new issues on reconsideration.[240] Decisions of the Benefits Review Board in Black Lung cases are published in the Black Lung Reporter.[241]

Appeals from adverse decision in Veterans disability benefits claims based on a Rating Board determination or, if a hearing was held after a Rating Board determination, on a hearing officer's decision, are heard by the Board of

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Corp., 727 F.2d 74, 77 (3rd Cir. 1984). At least one court has held otherwise on the question of constitutional rulings. *See* American Stevedores, Inc. v. Salzano, 538 F.2d 933, 936 (2nd Cir. 1976). The Board expressly disagreed with *American Stevedores* in McCluskey v. Zeigler Coal Company, 2 BLR at 1-1254-62.

[234] *See* Kuhar v. Bethlehem Mines Corp., 5 BLR 1-765, 1-769 n.2 (1983); Cooley v. Alabama By-products, 5 BLR 1-816, 1-820 n.5 (1983).

[235] *See* Harris v. Nacco Mining Company, 12 BLR 1-115, 1-116 (1989).

[236] Oral argument can be requested under special circumstances, such as when the appeal presents novel issues, involves a substantial question of law on which there is a conflict among the administrative law judges, or if to do so will serve "the interest of justice." 20 C.F.R. § 802.304.

[237] *See* 20 C.F.R. §§ 802.404(b), (c).

[238] *Id.* § 802.404(a). The case can be remanded to the administrative law judge or to the deputy commissioner. Following the remand, the new decision is submitted to the Board and the parties are given an opportunity to respond. *See id.* § 802.405(a).

[239] *See id.* §§ 802.407(b), .409.

[240] *See* Micheletto v. Peabody Coal Company, 4 BLR 1-758, 1-759 (1982) (Citing 20 C.F.R. § 802.409).

[241] The Black Lung Reporter, published by Matthew Bender, also includes selected administrative law judge decisions.

Veterans Appeals.[242] The Board is made up of approximately sixty members, including a chair.[243] The Board operates quite differently from the Social Security Administration's Appeals Council on the one hand, and the Merit Systems Protection Board and Benefits Review Board on the other hand. In a sense, it incorporates both the informality of the Appeals Council and the more significant authority exercised by the Merit Systems Protection Board and the Benefits Review Board. It is uniquely different, however, because it operates, at least in the area of disability appeals, free from judicial review.[244] The overall result is an autonomous appellate board that operates without significant external control, a fact which led in part to legislation in 1988 to establish judicial review from Board of Veterans Appeals benefit decisions beginning in the Fall, 1989.[245]

An appeal to the Board of Veterans Appeals is initiated by filing a Substantive Appeal from a Statement of the Case issued following an adverse decision by the Rating Board, or from an adverse decision issued following an administrative hearing held by a hearing officer.[246] There are extensive specific requirements for a Substantive Appeal, which must be submitted on a prescribed form or by letter containing all information included on the form.[247] A Substantive Appeal must identify all legal and factual arguments for the appeal and must relate those arguments whenever possible to the reasoning included in the explanation of the original decision included in the Statement of the Case.[248] Although the Board is to construe arguments set out in a Substantive Appeal "in a liberal manner for purposes of determining whether they raise issues on appeal,"[249] it presumes that there is no objection to any statement of fact included in the Statement of the Case unless objected to specifically.[250]

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[242] *See generally* 38 U.S.C. §§ 4001-4006; 38 C.F.R. §§ 19.1-19.2.

[243] The chair is appointed by the President; other members are appointed by the Administrator from recommendations by the chair, subject to approval by the President. Veterans' Judicial Review Act, tit. II, § 201, 102 stat. 4105, 4109 (to be codified at 38 U.S.C. § 4001). The chair serves for six years; other members serve for nine years. *Id.* Previously, all members of the Board were selected by the Administrator with the approval of the President. *See* 38 U.S.C. § 4001 (Supp. IV 1986).

[244] Constitutional issues can be reviewed. *See* Johnson v. Robinson, 415 U.S. 361 (1974).

[245] Appeal will be to a new Article I Court of Veterans Appeals. *See* Veterans Judicial Reform Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

[246] A Statement of the Case is prepared following an adverse decision for veterans benefits, with or without an administrative hearing. If an administrative hearing is requested after a Rating Board decision, the Statement of the Case is prepared for the hearing. *See generally* text accompanying notes 149-59, *supra*. The Substantive Appeal must be filed within sixty days of the mailing of the statement of the case or within one year of the date of the original notice of decision, whichever is later. 38 C.F.R. § 19.129(b).

[247] *See id.* § 19.123(a) (Appeal on VA Form 1-9 or on "correspondence containing the necessary information").

The Substantive Appeal is filed at the office that originally decided the claim.[251] Before the Board assumes jurisdiction over the appeal, the regional office files a formal Certification of Appeal in which it identifies the issues raised in the appeal and certifies that all necessary procedural steps have been met.[252] The office has the option, if appropriate, to retain the case for further development or to advise the claimant that the statement of legal and factual errors included in the Substantive Appeal are deficient and to allow necessary amendments.[253] When new evidence is submitted before the record has been transferred to the Board, the evidence will be considered at the local office which can then issue a supplemental Statement of the Case.[254] A Substantive Appeal without allegations of specific errors of fact or law may be dismissed.[255]

Usually appeals are heard by the Board in panels of three members, referred to as Board Sections.[256] Sections have general areas of jurisdiction, including certain general areas of medical disability. One member of each section is a physician; the other two members are lawyers. Physician members of the Board are not expected to be specialists in the medical areas involved in an appeal; indeed, the Board has rejected suggestions that psychiatrists be used in mental disability cases noting that expert medical advice is available when needed.[257]

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[248] *Id.* § 19.123(a). The substantive appeal must also identify clearly the benefits sought on the appeal.

[249] *Id.* § 19.123(a).

[250] *Id.* § 19.121(b).

[251] *Id.* § 19.127.

[252] *Id.* § 19.123(b).

[253] *See* Veterans Administration Manual M21-1 § 18.13.

[254] 38 C.F.R. § 19.173.

[255] *Id.* § 19.126.

[256] *See id.* § 19.161.

[257] *See* 48 Fed. Reg. 6963 (1983).

Unlike the Appeals Council, Merit Systems Protection Board and Benefits Review Board, the Board of Veterans Appeals holds actual hearings in many appeals. Most hearings are held at the offices of the Board in Washington, although hearings can be held by traveling sections of the Board or by Veterans Benefits Administration personnel at regional offices.[258] The primary purpose of Board hearings is to allow for oral argument; however, additional documentary evidence may be presented at Board hearings and witnesses can testify.[259] When evidence is submitted to the Board, the Board has the option of referring the matter back to a local office for reconsideration.[260] The Board will not compel the appearance of witnesses.[261]

Board hearings are non-adversary.[262] The formal rules of evidence do not apply, and formal cross examination is specifically precluded; however, "follow up questions" are allowed.[263] The Board may request an expert medical opinion from the chief medical director or from an independent expert. A similar request may be made by an appellant as well.[264] If an expert opinion is obtained by the Board, a copy of the report will be sent to the appellant who then has sixty days to respond.[265] The Board also has the option to remand a case for further development.[266]

The Board must issue a written decision disposing of each issue raised by the appeal, including separate findings of fact and conclusions of law, and reasons for the decision.[267] Board decisions must be "based on a review of the entire record."[268] The Board considers itself bound only by Department of Veterans Affairs regulations, other instructions to the Board issued by the Veterans Benefits Administration and opinions of the Department's general counsel.[269] The Board does not consider itself bound by Veterans Benefits Administration manuals.[270] Most importantly, the Board does not consider itself bound by its own prior decisions. As stated in Board regulations, "[p]reviously issued Board decisions will be considered binding only with regard to the specific case decided; prior decisions in other appeals may be considered in a case to the extent that they reasonably relate to the case."[271] Moreover, Board decisions are not published or easily available; the only index is on microfiche and individual decisions must be obtained by mail.

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[258] When hearings are held at regional offices, the final decision is made by members of the Board based on the record compiled at the hearing. *See* 38 C.F.R. § 19.160(c).

[259] *See* Veterans Administration Manual MBVA-1 § 5.02. *See also* 38 C.F.R. § 19.157(b).

[260] *See id.* § 19.174.

[261] *Id.* § 19.165(a). The Board has stated that it lacks authority to subpoena administration personnel. *See* 48 Fed. Reg. 6966 (1983).

[262] 38 C.F.R. § 19.157(c).

[263] *Id. See also* Veterans Administration Manual MBVA-1 § 5.11.

[264] *See* 38 C.F.R. §§ 19.176-178. An appellant's request "will be granted upon a showing of good cause, such as where complex or controversial medical issues are involved in the appeal." *Id.* § 19.178.

[265] *Id.* § 19.179. Under certain circumstances, the opinions are made available only to the appellant's attorney or representative. *See* 38 U.S.C. § 3301.

[266] *See* 38 C.F.R. § 19.182(a).

[267] *Id.* § 19.180(b), (c).

[268] *Id.* § 19.180(a).

An appellant may seek reconsideration of a Board decision, and the Board can reconsider its decision on its own motion. This can be done at any time on the basis of an "obvious error of fact or law" or when "new and material evidence" is obtained from service department records.[272] The Chair may deny a request for reconsideration; if a request for reconsideration is granted, it is heard by the section that heard the case originally supplemented by an equal number of additional Board members.[273] Once the Board issues its decision or its decision on reconsideration, the decision is binding and subject only to limited judicial review.[274] There is, however, a relatively liberal policy allowing claims to be reopened based on new evidence.[275]

III. ADMINISTRATIVE CONFERENCE RECOMMENDATIONS RELATING TO SOCIAL SECURITY ADMINISTRATIVE APPEALS

The Administrative Conference has published three sets of recommendations concerning the administration of Social Security disability claims. The first set of recommendations was published in 1978, and dealt primarily with administrative hearing procedures.[276] These recommendations were based largely on the findings of a major study commissioned by the National Center for Administrative Justice.[277] The other two sets of recommendations were published in 1987, based on reports prepared for the Administrative Conference. One set of recommendations dealt with state agency disability determinations, with a special emphasis on the value of face-to-face procedures for initial and reconsidered disability determinations.[278] The other set of recommendations were directed at the Appeals Council.[279]

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[269] *See* 38 U.S.C. § 4004(c); 30 C.F.R. § 19.103(a).

[270] *Id.* § 19.103(b).

[271] *Id.* § 19.197. The Board has rejected suggestions that it consider its prior decisions as precedent. *See* 48 Fed. Reg. 6968 (1983).

[272] 30 C.F.R. § 19.185.

[273] *Id.* § 19.189(b).

[274] There is provision for certain limited constitutional challenges under present law. More general judicial review will be available in late 1989. *See* text accompanying notes 244-45, *supra*.

[275] *See* 38 C.F.R. § 3.114. Reopening is discussed generally at text accompanying notes 49-50, *supra*.

The 1978 recommendations were the most comprehensive, in that they sought to deal with a broad range of concerns about the efficiency and competence of the Social Security Administration's administrative appeals process. The study which led to the Conference's 1978 recommendations identified three main concerns about Social Security administrative hearings: delays in processing appeals at the administrative hearing level and a resulting backlog of cases awaiting hearing, high reversal rates of state agency decisions by administrative law judges, and substantial variances in reversal rates among the administrative law judges.[280] These concerns, which raised serious questions of speed, accuracy and consistency in the process, together with related concerns about claimant satisfaction and administrative costs, were found, however, to be manageable within a modestly revised system for administrative appeals.[281] As a result, the Administrative Conference specifically declined to endorse any radical changes. As stated in the introduction to its formal recommendations, "more dramatic proposals for reform of the [Social Security disability appeals] system are inadvisable . . . [T]he difficulties are not so overwhelming that the proposal of a markedly different system is required. Hence the recommendations that follow are for the most part interstitial and conservative. Their purpose is to prescribe improvements while reinforcing sound practice."[282] The 1987 recommendations on state agency determinations were limited by the fact that the Social Security Administration was in the process of running demonstration projects to assess the viability of holding evidentiary hearings and personal interviews as part of a one-step initial determination process in place of the present separate initial decision and reconsideration procedures.[283] Although certain preliminary conclusions supporting the use of face-to-face procedures were presented, most of the recommendations were of a contingent nature depending on the final results of the demonstration projects.[284]

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[276] *See* Recommendation No. 78-2, 1 C.F.R. § 305.78-2 (1988) [hereinafter Recommendation 78-2].

[277] For a published version of that study, *see* J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkvil, M. Carrow, Social Security Hearings and Appeals (1978). Professor Mashaw prepared a separate report for the Administrative Conference drawing from the earlier study. *See* J. Mashaw, Report to the Grants and Benefits Committee on the Social Security Hearings and Appeals Process, in Administrative Conference of the United States, Recommendations and Reports (1978) [hereinafter 1978 Report].

[278] *See* Recommendation No. 87-6, 1 C.F.R. § 305.87-6 [hereinafter Recommendation 87-6]. *See generally* A. Schoenberger, State Disability Services' Procedures for Determining and Redetermining Social Security Claims for the Social Security Administration, (Administrative Conference 1987) [hereinafter 1987 State Agency Report].

[279] *See* Recommendation No. 87-7, 1 C.F.R. § 305.87-7 [hereinafter Recommendation 87-7]. *See generally* C. Koch and D. Koplow, A Fourth Bite at the Apple: A Study of the Social Security Administration's Appeals Council (Administrative Conference 1987) [hereinafter 1987 Appeals Council Report].

[280] 1978 Report, *supra* note 277, at 83-85. The report, drawing on congressional material, notes that the processing time for hearings had risen from 118 days in 1971 to 217 days in 1975, and that in June 1977, nearly 3,000 more hearing requests were filed than the number of appeals completed. The report also notes that the reversal rate for administrative law judges was almost fifty percent, but less than half of the judges had a reversal rate within a ten percent variance of that average. *Id.*

The 1987 recommendations on the Appeals Council offered the most radical suggestions for change of all three sets of recommendations. The report accompanying the recommendations concluded that the Appeals Council is simply unable to provide meaningful review of the tremendous volume of cases submitted to the Council each year.[285] In Fiscal Year 1988, the Council handled more than 100,000 cases, including approximately 80,000 reviews of individual claims.[286] Laboring under an unmanageable caseload also resulted in a failure to identify and pursue appropriate goals.[287] Accordingly, the Conference recommended that the Appeals Council reduce drastically the number of individual claims it reviews and shift its orientation toward policy making.[288]

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[281] *Id.*, at 86.

[282] 1 C.F.R. § 305.78-2(b). *See also* 1978 Report, *supra* note 277, at 86.

[283] The demonstration projects were mandated by Congress in the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460 § 6, 98 Stat. 1794 (1984). The year before Congress had responded to criticism of existing procedures for terminating disability benefits -- in particular the Social Security Administration's system for continuing disability reviews -- by requiring states to give claimants the option of an evidentiary hearing as part of the reconsideration procedures used in all continuing review cases. *See* Social Security Amendments of 1983, Pub. L. No. 97-455, 96 Stat. 2498 (1983). These procedures are discussed at text accompanying notes 35-40, *supra*.

[284] *See* 1 C.F.R. § 305.87-6.

[285] *See* 1987 Appeals Council Report, *supra* note 279, at 5 ("The magnitude of the current caseload, and the Appeals Council's efforts to dispatch it with diligence and compassion, defy effective management").

Although each of the three sets of recommendations concentrated on one level of the administrative appeals process, each set has implications for the appeals process as a whole. Similarly, procedures in place at one level of the appeals process have an impact on recommendations for change elsewhere in the process. It was recognized in the state agency study, for example, that adding a face-to-face interview at the initial decision level could not be considered a substitute for administrative hearings without considering major additional changes in the process.[289] Similarly, one of the arguments presented in the 1978 report against "radical" reform of the administrative hearings system was that this could be done only after careful evaluation and analysis of state agency procedures.[290] Nonetheless, taken together, the individual recommendations offer suggestions for reform from reconsideration through the Appeals Council with relatively little conflict or overlap.

Rather than discuss each set of recommendations separately, the significant recommendations included in all three sets of recommendations will be presented together below by matching specific recommendations to the three levels of the current administrative appeals process. Thus, recommendations relating to reconsideration from the 1987 state agency study will be presented first. These will be followed by recommendations on administrative hearing procedures from the 1978 study and the 1987 state agency study. This material is broken down further into three subcategories: pre-hearing procedures, hearings procedures, and post-hearing procedures. Then, recommendations on the Appeals Council from the 1978 and 1987 Appeals Council studies will be discussed. Finally, the major recommendations from all three sets of recommendations will be compiled together and presented as a model for reform of the Social Security administrative appeals process.

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[286] *Id.*, at 90, n.220. The remaining cases were cases pending in federal district court, which must be reviewed and processed by the Appeals Council, and remands ordered by a federal court.

[287] As stated in the report, "the Appeals Council as an institution fails to achieve the goals identified for it, and fails any more to contribute very much to their pursuit by other bureaucratic units." *Id.*, at 209.

[288] *See* 1 C.F.R. § 305.87-7.

[289] *See* 1987 State Agency Report, *supra* note 278, at 55.

[290] *See* 1978 Report, *supra* note 277, at 86.

A. Pending Recommendations

Although most of the Administrative Conference's specific recommendations address particular aspects of the Social Security Administration's administrative appeals process, a few general recommendations directed at the process as a whole were made as well. Thus, the Conference recommended in 1978 that the Social Security Administration "devote more attention to the development and dissemination of precedent materials."[291] It was suggested, as examples, that the Administration codify "settled or established policies" by regulation, follow a policy of "reasoned acquiescence or nonacquiescence" in judicial decisions, and publish "fact-based precedent decisions."[292] Although not directed at a particular level in the administrative appeals process, this recommendation was intended for decisionmakers and administrators with authority over decisionmakers.[293] An even more broadly stated general recommendation in 1978 supported the continuation of "an aggressive quality assurance program to identify errors, determine their causes and prevent their recurrence."[294]

1. Reconsideration

The Administrative Conference supported the implementation of demonstration projects on the use of personal interviews with claimants at both the initial decision level and on reconsideration.[295] As part of this process, the Conference recommended in 1987 that the

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[291] Recommendation 78-2, *supra* note 276, at (C)(2).

[292] *Id.* *See also* 1978 Report, *supra* note 277, at 110-12. Specific recommendations for publication of precedent decisions by the Appeals Council were made in 1987. *See* text accompanying note 333, *infra.*

[293] Thus, as part of the same recommendation it was suggested that periodic conferences be held with administrative law judges to discuss "new legal developments or recurrent problems." Recommendation 78-2, *supra* note 276, at (c)(2). Similar suggestions were made in the Conference's 1987 recommendations directed specifically at the Appeals Council. *See* Recommendation 87-7, *supra* note 279, at (1)(f).

[294] Recommendation 78-2, *supra* note 276, at (C)(3).

[295] *See* text accompanying notes 278, 283-84 , *supra.*

Social Security Administration evaluate the current use of evidentiary hearings in continuing disability review cases as well as the results of the demonstration projects in making its report to Congress.[296] The recommendations themselves take no position on the use of face-to-face procedures at the state agency level; however, the report accompanying the recommendation states that the procedures "appear quite promising."[297] Recognizing that budgetary constraints may make full implementation of face-to-face procedures for all disability claims impossible, the Conference did suggest that it might be appropriate to hold interviews only in selected cases based on guidelines that consider the evidence in the record, the medical condition involved in the claim, and the opinion of the examiner processing the case whether a personal interview "would be of significant assistance to the ultimate determination."[298]

The Administrative Conference has not recommended that the reconsideration stage be abolished. Instead, it has recommended that a cautious approach be followed once the report is made on the pending demonstration projects: "[c]lose scrutiny should be given to any legislative or other proposals to completely eliminate the reconsideration stage, taking into account the impact of that step on overall processing costs, and on the caseload at the ALJ stage."[299] To the extent that any proposals are considered which would combine the initial and reconsideration stages into a single initial decision procedure, the Conference recommended that the Social Security Administration consider the need for including a face-to-face procedure along the lines authorized in the demonstration projects.[300]

2. Administrative Hearing

The Administrative Conference has made a large number of recommendations relating to the conduct of administrative hearings, most of which form the core of the

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[296] Recommendation 87-6, *supra* note 278, at (1). The Conference also recommended delaying full implementation of any reforms in the use of evidentiary hearings or personal interviews at the initial or reconsideration stages until the publication of a final report on the demonstration projects by the Department of Health and Human Services. *Id.*, at (2).

[297] 1987 State Agency Report, *supra* note 278, at 54.

[298] Recommendation 87-6, *supra* note 278, at (3).

[299] *Id.*, at (7).

[300] *Id.*

1978 recommendations. A few of these recommendations apply generally to the administrative hearing process; others are directed to prehearing procedures, the conduct of the administrative hearing itself, or post-hearing procedures.

The first recommendation from the 1978 study was that the Social Security Administration continue to use administrative law judges to decide disability appeals, and that administrative law judges hearing those appeals continue to be appointed in conformity with the Administrative Procedure Act.[301] It was found that the major criticisms of using administrative law judges in disability hearings -- that hearings become too formal, the process becomes too costly, and a sufficient number of qualified administrative law judges cannot be recruited -- were unfounded. Rather, the use of independent administrative law judges was found to be more important than had been the case earlier in the program's history: "As the Social Security system comes under increasing fiscal pressure, and the pressures of a rising caseload, a less clearly independent corps of deciders would have greater difficulty resisting the 'institutional imperatives' to reduce both the effort expended on individual cases and the number of awards."[302]

The Administrative Conference supported administrative law judge independence despite the recognition that it results in some loss of agency control. An evaluation of current practice in the report accompanying the 1978 recommendations revealed that a proper balance had been struck at the Social Security Administration between honoring the independence of its administrative law judges and asserting appropriate control over policy and productivity.[303] Accordingly, along with its recommendation supporting continued use of independent administrative law judges, the Conference also recommended that the Office of Hearings and Appeals should, "consistent with the administrative law judge's decisional independence, . . . prescribe procedures and techniques for the accurate and expeditious disposition of . . . claims."[304]

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[301] Recommendation 78-2, *supra* note 276, at (A)(1). The Administrative Procedure Act and its application to Social Security disability appeals are discussed at text accompanying notes 352-57, *infra*.

[302] 1978 Report, *supra* note 277, at 89.

[303] Thus, the report concluded that "[o]n balance the current tension between individualized determination by independent ALJs, and management's desires to expedite the process and hold down costs seems healthy." *Id.*, at 89. With respect to policy, the report notes that the agency can require judges to follow rules and regulations designed to produce the types of substantive decisions it would itself hope to produce, and that "none of [the Bureau of Hearings and Appeals'] current actions interferes with decisional independence properly understood." *Id.*, at 91.

a. Prehearing Procedures

The Administrative Conference made a number of recommendations in 1978 aimed at improving the process for developing evidence at the administrative hearing level. In the study leading to the recommendations, it was found that hearings are extremely important for the development of evidence relating to claimants' functional limitations and residual capacities for work, and that it would be helpful to compile as much evidence as possible before the hearing to make the most effective use of the hearing to complete the development of the record.[305] Without precluding post-hearing development, the Conference therefore recommended that administrative law judges develop the record at the pre-hearing stage of the process "whenever sound discretion suggests that such development is feasible and useful."[306] It was noted in the report accompanying the recommendation that post-hearing development was common, and that proper questioning at the hearing was often limited due to a lack of necessary background medical evidence in the file. As a result, the hearing becomes a less effective means for the development of a full and complete record.[307] The recommendation itself notes, along similar lines, that although sometimes evidence can be obtained only after the hearing has been held, "pre-hearing development often may be necessary for an informed and pertinent exchange at the hearing."[308]

A second aspect of fact development addressed in the Administrative Conference's 1978 recommendation was the use of medical evidence supplied by claimants' treating physicians, both as independent sources and as supplemental sources when evidence is supplied by consulting physicians. The Social Security Administration's practice at the time was found to favor the use of consulting physicians over treating physicians, despite advantages of getting information from the physician with a regular relationship with the claimant, based at least in part on the perception of administrative law judges that treating physicians' reports tend to be biased in favor of claimants.[309] Notwithstanding these concerns and other concerns expressed about the quality of treating physician reports, the Conference recommended more effective use of treating physicians as sources of medical evidence, including the use of standard questionnaires to obtain necessary information from treating physicians.[310] Recognizing that information obtained from a treating physician may conflict with other medical evidence in the record, particularly reports from consulting physicians, the recommendation goes on to suggest that claimants be given the opportunity to have their treating physician respond in writing to any conflicting evidence.[311]

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[304] Recommendation 78-2, *supra* note 276, at (A)(2). The recommendation goes on to note that "[m]aintaining the administrative law judge's decisional independence does not preclude the articulation of appropriate productivity norms or efforts to secure adherence to previously enunciated standards and policies underlying the Social Security Administration's fulfillment of statutory duties." *Id.*

[305] *See* 1978 Report, *supra* note 277, at 92-93.

[306] Recommendation 78-2, *supra* note 276, at (B)(1).

[307] *See* 1978 Report, *supra* note 277, at 94.

[308] Recommendation 78-2, *supra* note 276, at (B)(1).

The Conference also recommended that better use be made of claimants as sources of relevant information. It was found that claimants were rarely relied upon to assist in the development of medical evidence, at least in part because they were usually not given sufficient information about the issues in dispute to be of much help.[312] Therefore, it was recommended that claimants be provided notice of the reasons given by the state agency for denying benefits, and notice of the "critical issues" that will be addressed at the hearing.[313]

Finally, the Conference recommended the experimental use of pre-hearing interviews on a more regular basis, citing two main purposes to be served by such procedures. First, pre-hearing interviews would improve the development of necessary evidence. Second, they would increase the likelihood of granting benefits in appropriate cases without a full hearing.[314] The recommendation went on, however, to note that "[d]ue regard should be paid to the convenience of the claimants and to the need for a suitable record for such interviews."[315] The actual gathering of evidence could be done by a hearing assistant or staff attorney, rather than the administrative law judge.[316]

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[309] *See* 1978 Report, *supra* note 277, at 94 ("ALJs rather consistently believe that consulting physicians are less biased and more expert than treating physicians, although the latter have a decidedly better opportunity to observe the claimant").

[310] Recommendation 78-2, *supra* note 276, at (B)(3).

[311] *Id.* *See also* 1978 Report, *supra* note 277, at 95 (Treating physician "is in a much better position to evaluate the consultative examiner's report and, in light of those findings, to supplement or explain his prior statements, than anyone else in the system").

[312] *See id.*, at 96.

[313] Recommendation 78-2, *supra* note 276, at (B)(4).

b. Hearing Procedures

The Administrative Conference made only one specific recommendation in 1978 directed at the actual conduct of administrative hearings: that administrative law judges engage in "careful and detailed questioning of the claimant at the hearing."[317] As stated in the accompanying report, judges vary considerably in the amount and quality of their questioning, but should "tend toward the more intensive end of the spectrum of [administrative law judge] practice."[318] As part of its 1987 recommendations concerning the use of personal interviews in state agency determinations, the Conference offered some support for the current role of the administrative hearing in the Social Security Administration's administrative appeals process. Thus, it was noted that the Administration "should proceed with caution" on the issue of whether the opportunity for an interview or a hearing at the state agency level should supplant the adjudicatory hearing before an administrative law judge. The Conference's position was that any such modifications to the initial and reconsideration process instead "should be seen as a possible way of reducing the number of appeals to the later stages of the process."[319] As part of the same set of recommendations, the Conference recommended that the evidentiary record should not be closed until the administrative hearing process has been completed, noting that the administrative hearing stage is the point at which claimants are most likely to be represented.[320]

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[314] *See id.*, at (B)(2). *See also* 1978 Report, at 94.

[315] Recommendation 78-2, *supra* note 277, at (B)(2). Concern about the use of preliminary interviews to develop evidence was also expressed in the report: "this information could be elicited briefly and informally in advance of the hearing, although to avoid subsequent controversy, a suitable record should be kept of what transpires at the pre-hearing interview." 1978 Report, *supra* note 277, at 93.

[316] *See id.*

[317] Recommendation 78-2, *supra* note 276, at (B)(4). There were also a number of recommendations directed at the use of official notice and the questioning of vocational experts. *See id.*, at (B)(5), (B)(6). Most of the concerns raised have been addressed with the promulgation of the Medical-Vocational Guidelines in 1978. *See* 1978 Report, *supra* note 277, at 99-107.

[318] *Id.*, at 97.

[319] Recommendation 87-6, *supra* note 278, at (6).

c. Post-Hearing Procedures

The Administrative Conference addressed two issues relating to post-hearing development of evidence as part of its 1978 recommendations. First, the Conference recommended that any new evidence obtained after the administrative hearing record is closed be offered to the administrative law judge as a request to reopen the record.[321] Second, recognizing that in some cases evidence will have to be developed after the hearing, the Conference recommended that claimants should not be requested to waive their rights to examine evidence submitted after the hearing.[322] Although claimants rarely comment on post-hearing evidence, the report accompanying the recommendation found the practice of requesting a waiver, followed by some administrative law judges, to be "highly objectionable."[323]

3. Appeals Council

The Administrative Conference issued a set of comprehensive recommendations addressed at the Appeals Council in 1987. Only one of its earlier recommendations touched on Appeals Council procedure. Thus, the Conference recommended in 1978 that Appeals Council review should be limited to the record developed by the administrative law judge; new evidence offered at the

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[320] *Id.*, at (9). *See also* 1987 State Agency Report, *supra* note 278, at 56 ("The record should not be closed at any point before a hearing stage at which claimants are likely to be represented by attorneys. At the moment, this is the ALJ level"). The report goes on to note that a shift to a single due process hearing at the state agency level, as opposed to a full administrative hearing before an administrative law judge, would present serious problems unless attorneys would represent claimants at the Disability Determination Services; in order to avoid "a significant tilt in the system against claimants," efforts would have to be made to encourage representation at the Disability Determination Services "such as transfer of hearings to be close to attorney offices, increased file availability to attorneys, routine photocopying of files, or something even more radical such as an entirely different manner of representing claimants at the DDS level." *Id.*

[321] Recommendation 78-2, *supra* note 276, at (C)(1). In 1987, the Conference recommended that evidence submitted improperly to the Appeals Council be presented to the administrative law judge in a petition to reopen. *See* notes 327-28, *infra*. Apparently this was also the intention in the 1978 recommendation. *See* 1978 Report, *supra* note 277, at 110.

[322] Recommendation 78-2, *supra* note 276, at (B)(7).

[323] 1978 Report, *supra* note 277, at 108.

Appeals Council level should be accepted into the record on appeal "only if a refusal to do so would result in substantial injustice or unreasonable delay."[324] As stated in the accompanying report, "the Appeals Council should, save in exceptional circumstances, limit itself to the correction of errors of law and, in that effort, to the enunciation of principles to guide subsequent cases."[325] Since that recommendation was published, Congress and the Social Security Administration have imposed greater restrictions on the introduction of new evidence at the Appeals Council level.[326] In a footnote to its 1987 Appeals Council recommendations, the Conference stated that the Council should receive new evidence only upon a showing of good cause; otherwise, cases with new evidence should be remanded to the administrative law judge, and cited the 1978 recommendation.[327] The purpose behind this recommendation was to encourage complete fact development at the administrative hearing stage and to return the issue of new evidence back to the administrative law judge whenever possible, thereby limiting Appeals Council review to closed records.[328]

The central recommendation of the Administrative Conference's 1987 study of the Appeals Council was to shift the Council's emphasis from reviewing all appeals from administrative hearing decisions to performing a more effective policy-making role in the adjudication of disability claims.[329] As stated in the accompanying report, "the Appeals Council would function principally in a 'systems reform' capacity, attempting to discover, elaborate, and implement changes in the entire disability adjudication system that could lead to better, earlier decisionmaking."[330] In order to accomplish this goal, the Conference recommended giving the Council discretion to refuse to review most petitions, limiting itself to cases that would allow it to rule on issues of general importance.[331] Three types of cases were suggested in the report as suitable for Appeals Council review: cases involving new and potentially difficult issues, cases involving issues known to be difficult or problematic, and a certain number of cases selected at random.[332] With a reduced caseload, the Appeals Council would concentrate on issuing general interpretations on questions of procedure and "adjudicatory principles" in the form of minutes, and would publish precedential opinions in selected cases. The Appeals Council would have to select from even its reduced caseload to identify opinions suitable for publication as precedential decisions.[333] These minutes and opinions would be indexed, distributed widely at the Social Security Administration, and made available to the public.[334]

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[324] *See* Recommendation 78-2, *supra* note 276, at (C)(1). As part of the same recommendation, it was recommended that evidence submitted after the hearing should be submitted to the administrative law judge as a request to reopen the decision. *See* text accompanying note 321, *supra*. The recommendation does not address the difference between having evidence admitted by the Appeals Council to review an administrative law judge's failure to reopen following a request made to the administrative law judge, and including evidence as part of a substantive appeal. In the former circumstance the result would necessarily be a remand by the Appeals Council; if the evidence is part of the substantive appeal presumably the Appeals Council could remand or consider the evidence itself.

[325] 1978 Report, *supra* note 277, at 110.

[326] *See* text accompanying notes 170-75, *supra*.

[327] *See* Recommendation 87-7, *supra* note 279, at (1)(c)(4), n.2.

[328] *See* 1987 Appeals Council Report, *supra* note 279, at 241 (notwithstanding some hardship to claimants who cannot assemble all of the evidence in time for the administrative hearing, "orderly litigation, and a respect for the finality of administrative judgments, suggest the importance of segregating the trial-level and the appellate-level functions more strictly").

[329] *See* Recommendation 87-7, *supra* note 279, at (1).

Other recommendations were intended to improve the quality of Appeals Council review of those individual cases selected for review, including more collaborative work on cases by members of the Appeals Council and greater participation by claimants representatives in briefing and arguing important issues raised by the appeals.[335] Other specific recommendations on procedures for individual reviews included issuing opinions with better reasoning and legal analysis,[336] and avoiding the substitution by Appeals Council members of their judgment on factual determinations for those of the administrative law judges.[337]

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[330] 1987 Appeals Council Report, *supra* note 279, at 223.

[331] Recommendation 87-7, *supra* note 279, at (1)(b). The idea is to retain review of individual cases as an important, but not dominant, part of the Council's work: "the cases (although far fewer of them) are still the primary input into the operation of the Appeals Council, but the primary output of the organization becomes 'clarification of policies' or 'ideas for change,' rather than simply a mass of correct individual adjudications." 1987 Appeals Council Report, *supra* note 279, at 223-24. A caseload of 5,000 to 10,000 was suggested as appropriate, being both manageable and a sufficiently large number to keep the Council from becoming "just another policy body divorced from the reality of the adjudication process." *Id.*, at 227.

[332] *See id.*, at 228-32.

[333] Thus, while recognizing that most disability cases are too fact-specific to warrant publication, the 1987 report urges that the Appeals Council "seek [forward-looking decisions], and seize the opportunity to promote uniformity by advertising throughout the system any common, successful approaches to the cases." *Id.*, at 233.

[334] Recommendation 87-7, *supra* note 279, at (1)(a)(2). The Conference also recommended that the Council increase its visibility by "seeking publication of precedent by a recognized reporter service." *Id.*, at (1)(f). *See also* 1987 Appeals Council Report, *supra* note 279, at 234 ("the Appeals Council should look for opportunities to make its decisions worthy of publication, and ought to distribute far more of them far more widely").

The 1987 recommendations also addressed the workload and staffing of the Appeals Council. Thus, the Conference recommended that efforts be made to reduce the time required to grant or deny review,[338] and, once the time period for review had passed, to allow for the reopening of claims only under existing standards.[339] In order to improve the status of the Appeals Council, the Conference recommended reducing the number of members, improving the selection process, and upgrading salary levels and civil service protection for Appeals Council members.[340] Although not stated in the recommendation, the accompanying report states that Appeals Council members should have the same Administrative Procedure Act guarantees of independence provided to administrative law judges.[341] Finally, the Administrative Conference recommended that if the Appeals Council does not prove to be effective in its new role, then the Social Security Administration should consider whether it should be abolished.[342]

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[335] *See* Recommendations 87-7, *supra* note 279, at (1)(c)(1), (1)(c)(2). The recommendation also contemplated the possibility of interested parties filing *amicus* briefs. *Id.*, at (1)(c)(2).

[336] *Id.*, at (1)(c)(3). *See also* 1987 Appeals Council Report, *supra* note 279, at 238 ("We look forward to the Appeals Council drafting opinions that -- even if not rivaling the federal judiciary in length or diversity -- are at least clear, responsive, forward-looking and individualized enough to be free of mindless boilerplate").

[337] Recommendation 87-7, *supra* note 279, *supra* note 279, at (1)(c)(4). Although not addressed directly in the recommendation, the accompanying report notes that the "substantial evidence" standard of review for fact determinations tends to be either ignored or interpreted as a license to reconsider the entire factual record. Accordingly, it is suggested in the report, but not included in the Conference's recommendation, that the Council use an "arbitrary" standard for determinations of fact in place of the "substantial evidence" standard. See 1987 Appeals Council Report, *supra* note 279, at 240.

[338] The report suggests 30 days for deciding whether to grant review, and then another 60 days to decide the case. *Id.*, at 242.

[339] *See* Recommendation 87-7, *supra* note 279, at (1)(c)(5), (1)(c)(6). As stated in the accompanying report, "[t]he Appeals Council should not . . . be empowered to reopen a case merely because it has missed the ordinary deadline for review -- only factors such as fraud, clerical error, or obvious mistake should disturb the finality of the decision." 1987 Appeals Council Report, *supra* note 279, at 242-43.

[340] Recommendation 87-7, *supra* note 279, at (1)(d). With respect to salary, the recommendation was to upgrade Appeals Council members' salary level to one level above that of Social Security Administration administrative law judges. *Id.* The report suggests limiting memberships to eleven. 1987 Report, *supra* note 279, at 248.

B. Model for Administrative Appeals Based on Pending Administrative Conference Recommendations

A model for reform of the Social Security Administration's administrative appeals process can be derived from the pending recommendations of the Administrative Conference. This model would reduce the levels of administrative action to three: initial determinations, administrative hearing and Appeals Council review. There would be significant changes in the initial determination process to compensate for the elimination of the reconsideration level of review, limited changes at the administrative hearing level and a substantial shift in emphasis in the work of the Appeals Council.[343] In addition to specific changes in the administrative appeals process, a model based on the Administrative Conference's recommendations would operate under certain general principles for adjudications, most of which amount to fine tuning of current policies and practices.

Reforms supported by pending Conference recommendations would consist of the following:

1. Add an optional face-to-face interview at the initial decision level and eliminate reconsideration.[344]

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[341] *Id.*, at 247. The report also suggested that the Council be made a separate component within the Office of the Commissioner, but the Conference did not make this recommendation. *See id.*, at 249.

[342] Recommendation 87-7, *supra* note 279, at (2). The option of abolishing the Appeals Council outright was considered in the report accompanying the 1987 recommendations. *See* 1987 Appeals Council Report, *supra* note 279, at 210-15. The report concluded "the Appeals Council can not continue as it is; if the recommended improvements [included in the formal recommendations] are not promptly forthcoming, or if they prove inefficacious, then the Appeals Council ought to be abolished." *Id.*, at 215.

[343] Thus, the Conference's 1978 recommendations concentrating on administrative hearings proposed interstitial and conservative suggestions, whereas the 1987 recommendations on the Appeals Council offered far more radical suggestions for change. *See* text accompanying notes 280-82, 285-88, *supra*.

[344] The Conference has not made a formal recommendation to this effect; however, support for this change in procedures can be found in the Conference's 1987 recommendations on state agency determinations, which were limited by the fact that the Social Security Administration was still

2. Increase efforts at pre-hearing development of records, including more effective use of treating physicians and claimants as sources of medical evidence.[345]

3. Encourage greater use of pre-hearing interviews in order to improve the development of records and identify appropriate cases for granting of benefits without a full hearing.[346]

4. Require that claimants request a reopening of the administrative hearing record if they wish to submit new evidence obtained after the administrative hearing record is closed.[347]

5. Allow claimants to present new evidence to the Appeals Council only for good cause. If good cause cannot be shown, claimants would be required to request a reopening of the administrative hearing record from the administrative law judge.[348]

6. Limit Appeals Council review of individual claims to discretionary review, and concentrate its efforts on a policy-making role through the issuance of generally applicable interpretations of law and procedure and the publication of precedential opinions in selected cases.[349]

IV. SOCIAL SECURITY ACT AND ADMINISTRATIVE PROCEDURE ACT PROVISIONS RELATING TO ADMINISTRATIVE APPEALS PROCESS

Both the Social Security Act[350] and the Administrative Procedure Act[351] set forth requirements for administrative appeals that apply to Social Security disability

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conducting demonstration projects on the use of personal interviews as part of the process for initial decisions and reconsideration. *See generally* text accompanying notes 295-302, *supra*.

[345] *See* text accompanying notes 305-313, *supra*. Although this recommendation was directed at the administrative hearing level, logically the recommendation for greater use of treating physicians and claimants as sources of medical evidence would apply to the initial decision level as well.

[346] *See* text accompanying notes 314-316, *supra*.

[347] *See* text accompanying note 321, *supra*.

[348] *See* text accompanying notes 324-28, *supra*.

[349] *See* text accompanying notes 329-334, *supra*. As part of this recommendation, certain suggestions for improving the quality of review by the Appeals Council of cases selected for review would be included. *Id.*

[350] *See* 42 U.S.C. §§ 401-433 (Chapter 7, Subchapter II: Federal Old-Age, Survivors, and Disability Insurance Benefits) (1982 & Supp. IV 1986).

[351] *See* 5 U.S.C. §§ 551-559 (Chapter 5, Subchapter II: Administrative Procedure) (1982 & Supp. V 1987); *id.* §§ 1305, 3105, 3344, 5372, 7521 (provisions relating to administrative law judges).

adjudications. The Social Security Act contains general rules of procedure applicable to administrative determinations and administrative appeals in disability claims for both Disability Insurance Benefits, including claims by disabled survivors, and Supplemental Security Income.[352] The Administrative Procedure Act itself does not require a hearing on any issue before an agency; it applies only when another substantive statute prescribes a hearing on the record.[353] Therefore, in order for the Administrative Procedure Act's requirements for the conduct of adjudications and the status of administrative law judges to apply to Social Security disability claims, they must do so by virtue of the fact that the Social Security Act requires the determination of disability claims "on the record after opportunity for an agency hearing."[354]

The Supreme Court declined to decide whether the hearing requirements of the Administrative Procedure Act apply to Social Security disability claims when the issue was raised in *Richardson v. Perales*.[355] However, applicability seems clear. Indeed, Social Security disability hearings in which an administrative law judge makes findings of fact and conclusions of law and then decides eligibility for benefits would seem to be the very model of a decision based on a record after a hearing, which triggers application of the Administrative Procedure Act.[356] Courts have assumed applicability in other contexts, such as the independence of administrative law judges and official notice.[357] Other provisions of the Administrative Procedure Act unrelated to administrative appeal procedures, such as those governing rulemaking, also apply to Social Security disability claims.[358]

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[352] 42 U.S.C. §§ 405, 1383(c).

[353] *See* United States v. Allegheny-Ludlum Steel, 406 U.S. 742, 756-57 (1972); Webster Groves Trust Co. v. Saxon, 370 F.2d 381, 385-86 (8th Cir. 1966).

[354] The Administrative Procedure Act applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," 5 U.S.C. § 554(a); the Social Security Act provides that a claimant dissatisfied with an initial decision must be given the opportunity for a hearing and a decision on the basis of evidence presented at the hearing. *See* 42 U.S.C. §§ 405(b)(1), 1383(c)(1).

[355] 402 U.S. 389 (1971). The Court stated that "[w]e need not decide whether the APA has general applicability to Social Security disability claims, for the Social Security administrative procedure does not vary from that prescribed by the APA." *Id.*, at 409.

[356] *See* IT&T Corp. v. AFL-CIO, 419 U.S. 428, 443-44 (1975). Even without the words "on the record" in the Social Security Act, the Administrative Procedure Act would still apply under current practices. *See* Marathon Oil Co. v. EPA, 564 F.2d 1253, 1263 (9th Cir. 1977) ("[w]hether the formal adjudicatory hearing provisions of [the Act] apply to specific administrative processes does not rest on the presence or absence of the magical phrase 'on the record,'" but rather on the "substantive character of the proceedings included").

[357] *See, e.g.*, Nash v. Bowen, 869 F.2d 675, 679 (2d Cir. 1989); Rives v. Schweiker, 684 F.2d 1144, 1154 n.10 (5th Cir. 1982).

The relevant provisions of the two acts will be discussed separately below. Although bound by the requirements of both acts, the Social Security Administration has implemented rules and regulations with respect to most of the areas covered by the Administrative Procedure Act that equal or exceed the statutory requirements. It has also implemented the relevant provisions of the Social Security Act. To the extent that the Administration has promulgated rules and regulations which exceed the requirements of the Administrative Procedure Act, it is bound to follow its own, more stringent procedural requirements.[359] Accordingly, presently most of the requirements in the Administrative Procedure Act are not applicable directly to Social Security disability adjudications. However, the Social Security Administration is bound by those requirements in the sense that it cannot rescind or modify its rules and regulations if to do so would establish procedures that conflict with the Administrative Procedure Act.

A. Administrative Procedure Act Requirements

There are provisions in the Administrative Procedure Act which touch upon most aspects of the Social Security Administration's administrative appeals process. Most generally, the Act requires publication of rules of procedure in the Federal Register.[360] Also, the Act authorizes agencies to issue their own rules for compliance with the requirements of the Act.[361] The significant specific requirements for adjudications relevant to Social Security disability claims cover notice, the conduct of administrative hearings, the status of administrative law judges, the decisionmaking process, and post-hearing review.

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[358] *See* 5 U.S.C. § 553. This is true notwithstanding the exemption for rules relating to grants and benefits in *id.* § 553(a)(2), because the Social Security Administration has waived the applicability of the exemption. *See* Buschmann v. Schweiker, 676 F.2d 352, 356 n.4 (9th Cir. 1982). The Act does not apply, however, to "interpretive" rules issued by the Social Security Administration. *See, e.g.*, Guadamuz v. Bowen, 859 F.2d 762, 771 (9th Cir. 1988).

[359] *See* Morton v. Ruiz, 415 U.S. 199, 235 (1974).

[360] 5 U.S.C. §§ 552(a)(1)(C), 553(b).

[361] *Id.* § 559.

1. Notice

The Act requires that parties receive notice of hearings which include the time, place and nature of the hearing, the authority under which the hearing is to be held, and a statement of the factual and legal issues that will be addressed.[362] The notice must include all disputed matters of law, and the agency may not change the matters in dispute without giving the parties involved reasonable notice of the change.[363] Moreover, the scope of the hearing and the final decision must be based on the coverage identified in the notice.[364] Parties not given proper notice are not bound by the decision.[365]

2. Conduct of Administrative Hearing

The Administrative Procedure Act includes a number of specific requirements for the conduct of administrative hearings applicable to Social Security disability claims. Although these requirements are substantial, they fall short of requiring all of the procedures applicable to judicial proceedings.[366] Thus, parties are given the right to submit evidence and present arguments supporting their claim for benefits.[367] They can appear by themselves, or with a lawyer or "other duly qualified representative."[368]

Any oral and documentary evidence can be submitted, subject only to rules on relevance, materiality and undue repetition.[369] Evidence is not limited to that which would be admissible in a judicial proceeding.[370] In addition to evidence supporting their claim for benefits, claimants are entitled to submit rebuttal evidence and to "conduct such cross examination as may be required for a full and true disclosure of the facts."[371] However, an agency may require that all or part of the evidence supporting a claim for money or benefits be submitted in written form "when a party will not be prejudiced thereby."[372] The Act gives claimants the right, in other words, to present their case and to be heard.[373] The person conducting the hearing cannot consult anyone on a "fact issue" unless notice of the consultation is provided and all parties are given the opportunity to participate.[374] If "official notice" of a fact not in the record is to be considered in making a decision, the parties must be allowed to respond and dispute that fact.[375]

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[362] *See id.* § 554(b). *See also* Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431, 1435 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986). With respect to the time and place of hearings, the Act specifies that "due regard shall be had for the convenience and necessity of the parties or their representatives." 5 U.S.C. § 554(b).

[363] *See* Rodale Press, Inc. v. FTC, 407 F.2d 1252 (D.C. Cir. 1968).

[364] 5 U.S.C. § 554(c)(2). There is an exception if the matter is resolved otherwise by consent which, in the context of disability benefits, has little meaning except perhaps for an agreement on contested dates of disability.

[365] *See, e.g.*, NLRB v. Tennsco Corp., 339 F.2d 396, 399 (6th Cir. 1964).

[366] *See* Alesi v. Cornell, 250 F.2d 877, 879 (9th Cir. 1958).

[367] 5 U.S.C. § 554(c)(1).

[368] *Id.* § 555(b).

[369] *Id.* § 556(d).

[370] *See* McKee v. United States, 500 F.2d 525, 528 (Ct. Cl. 1979) ("In an administrative hearing, 'rank hearsay' not only is admissible, . . . but [it] can constitute substantial evidence if sufficiently convincing to a reasonable mind").

The Act also includes a number of hearing procedures which the person presiding at a hearing is authorized to use, subject to rules published by the appropriate agency. Thus, a Social Security administrative law judge is authorized under the Act to administer oaths, subpoena witnesses, take or authorize the taking of depositions, hold pre-hearing conferences for purposes of settlement or simplification of the issues, rule on matters of proof and evidence, dispose of procedural requests, control the conduct of the hearing, issue recommended decisions, and take any other action authorized by the Social Security Administration that is also consistent with the Administrative Procedure Act.[376] The Act requires a written explanation of the denial of any written request regarding a procedural matter.[377] The record compiled for the decision, including a transcript of the testimony and copies of all exhibits and other papers filed, must be made available to parties at cost.[378] Also, *ex parte* communications between persons outside the agency and the person conducting the hearing are prohibited.[379]

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[371] 5 U.S.C. § 556(d).

[372] *Id.* § 556(d).

[373] *See* Green Spring Dairy, Inc. v. Commissioner, 208 F.2d 471, 475 (4th Cir. 1953).

[374] *See* 5 U.S.C. § 554(d)(1).

[375] *Id.* § 556(e).

[376] *Id.* § 556(c).

[377] *Id.* § 555(e). There is an exception when the decision either affirms a prior denial or is "self explanatory." *Id.*

[378] *Id.* § 556(e).

[379] *Id.* §§ 557(d)(1)(A)-(B). The Act also includes certain remedial steps to be taken if such communications occur. *Id* §§ 557(d)(1)(C)-(E).

3. Status of Administrative Law Judges

The Administrative Procedure Act requires that hearings be held by either the agency itself, members of the "body which comprises the agency," or an administrative law judge or panel of administrative law judges appointed by the agency under the general congressional grant of authority for the appointment of administrative law judges.[380] If the hearing is conducted by someone other than the agency, such as an administrative law judge, the initial decision must be made by that person unless agency rules require that the entire record be submitted to the agency for the agency to make the decision.[381] In any event, the person conducting the hearing must be the person who decides the claim at that level, whether in the form of an initial decision or a recommended decision to the agency.[382] Also, the person making the decision at the hearing must be independent from anyone in the agency responsible for investigation or prosecution.[383] Therefore, the agency may not "infringe on the decisional independence of [administrative law judges] . . . [so that the] administrative hearing [can] 'be conducted in an impartial manner.'"[384] An administrative law judge is expected to act in an impartial and disinterested manner.[385]

The Act also provides certain protections to maintain the independent status of administrative law judges. Although appointed by the agency,[386] if needed, administrative law judges from one agency can be assigned temporarily to another.[387] Their pay is prescribed by the Office of Personnel Management under Civil Service rules.[388]

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[380] *Id.* § 556(b). The purpose of this requirement is "to limit conduct of hearings and reception of evidence to specially qualified persons who are to be an essential part of the administrative adjudicatory process." U.S. Health Club, Inc. v. Major, 292 F.2d 665, 666 (2d Cir. 1961). Authority for the appointment of administrative law judges is at 5 U.S.C. § 3105.

[381] *Id.* § 557(b).

[382] *Id.* § 554(d). There is an exception if the person conducting the hearing is "unavailable." *Id.*

[383] *Id.* § 554(d)(2).

[384] Nash v. Bowen, 869 F.2d 675, 680 (2d Cir. 1989) (quoting 5 U.S.C. § 556(b).

[385] *See* 5 U.S.C. § 556(b); NLRB v. Tamper, Inc., 522 F.2d 781, 789-90 (4th Cir. 1975). *See also* Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967) (administrative law judge needs to be impartial to satisfy due process requirements).

[386] *See* note 380, *supra.*

[387] 5 U.S.C. § 3344.

[388] *Id.* § 5372. Thus, "[a]dministrative law judges . . . are entitled to pay prescribed by the Office of Personnel Management independently of agency recommendations or ratings." *Id.*

Moreover, a personnel action against an administrative law judge can be taken only according to rules prescribed by the Merit Systems Protection Board and after a hearing before the Board.[389] Both the Office of Personnel Management and the Merit Systems Protection Board have been given authority to promulgate regulations in accordance with these responsibilities.[390]

4. Decisionmaking Process

The Administrative Procedure Act states that the proponent of an order has the burden of proof, unless the allocation of burden is provided otherwise by statute.[391] The decision must be based on the whole record and "supported by and in accordance with the reliable, probative, and substantial evidence."[392] The decisionmaker must, of course, weigh the evidence, and the Act has been interpreted as contemplating a preponderance-of-the-evidence standard of proof for administrative hearings.[393] In contrast, the standard of review that an appellate court applies on an appeal from the administrative hearing is the "substantial evidence" test.[394] Substantial evidence means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[395] The record for decision is limited to the testimony at the hearing, exhibits, and all other papers and requests filed during the course of the hearing.[396] The Act also requires that an agency confine itself to the record in making adjudicatory determinations.[397] Therefore, an agency may not consider evidence outside the record if that evidence causes "substantial prejudice."[398] However, an agency may allow new evidence to be submitted after the record has been closed so long as the claimant has ample opportunity to cross examine witnesses or otherwise rebut the new evidence.[399] Before a decision is made at the hearing, parties must be given a reasonable opportunity to submit proposed findings and conclusions or exceptions to recommended or tentative agency decisions, together with a statement supporting the proposed findings and conclusions or exceptions. In addition, any proposed findings and conclusions or exceptions, and a ruling on them, must be included in the record.[400]

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[389] *See id.* § 7521. ("An action may be taken against an administrative law judge . . . only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board"). *See generally* Rosenblum, *Contexts and Contents of "For Good Cause" as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors*, 6 W. New. Eng. L. Rev. 593 (1984).

[390] 5 U.S.C. § 1305.

[391] *Id.* § 556(d). *See generally* Bosma v. USDA, 754 F.2d 804, 810 (9th Cir. 1984) (burden of proof defined as burden of going forward with evidence).

[392] 5 U.S.C. § 556(d).

[393] *See* Steadman v. SEC, 450 U.S. 91, 99-100 (1980), *rehearing denied*, 451 U.S. 933 (1981). *See also* Fischer and Porter Co. v. United States International Trade Commission, 831 F.2d 1574, 1580-81 (Fed. Cir. 1987) (applying the *Steadman* case and its standard of proof to patent infringements); Sea Island Broadcasting Corp. of South Carolina v. F.C.C., 627 F.2d 240, 243 (1980) ("The use of the 'preponderance of evidence' standard is the traditional standard in . . . administrative proceedings").

[394] *Steadman*, 450 U.S. at 100.

[395] Universal Camera Corp. v. NLRB, 340 U.S. 470, 477 (1951). This is the same standard enunciated under the Social Security Act. *See* text accompanying note 434, *infra*.

Hearing decisions must be made a part of the record and must include findings and conclusions on all "material issues of fact, law, or discretion presented on the record," a statement of the reasons and bases for the findings and conclusions, and a statement of the relief awarded or denied.[401] The Act requires agencies to decide cases in light of all the evidence on the record, and to give reasons for their decisions consistent with applicable law.[402] An agency must articulate its findings and the reasons for its decision clearly and precisely.[403] When an initial decision is made by the person presiding at the hearing, that decision must become the final decision of the agency unless there is an appeal from or review of the decision by the appropriate administrative review body within applicable time limits.[404]

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[396] 5 U.S.C. § 556(e).

[397] *Id.*

[398] *See* Marathon Oil Co. v. E.P.A., 564 F.2d 1253, 1265 (9th Cir. 1977) (quoting United States v. Pierce Auto Freight Lines, 327 U.S. 515, 528 (1946). *See also* Dotson v. Peabody Coal Co., 846 F.2d 1134, 1138 (7th Cir. 1988) ("It is unfair and irrational for the trier of fact to rely on evidence outside the record [because] . . . such evidence cannot be challenged by opposing counsel").

[399] *See* In re Three Mile Island Alert, Inc., 771 F.2d 720, 731 (3d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986). The same requirement has been found in the Social Security Act. *See* note 430 and accompanying text.

[400] 5 U.S.C. § 557(c).

[401] *Id.*

[402] *See* United Auto Workers v. NLRB, 459 F.2d 1329 (D.C. Cir. 1972).

[403] *See* Nader v. NRC, 513 F.2d 1045, 1051 (D.C. Cir. 1975). A recitation of conclusions without a showing of supporting facts is ineffectual. Great Lakes Screw Corp. v. NLRB, 409 F.2d 375, 379 (7th Cir. 1969); Deaton, Inc. v. ICC, 693 F.2d 128, 131 (11th Cir. 1982). In *Deaton*, the court noted that an agency determination could be upheld if the basis for its decision could be discerned from the opinion. 693 F.2d at 131. *See also* Benmar Transport & Leasing Co. v. FCC, 623 F.2d 740, 741 (2d Cir. 1980) ("Despite an agency's failure to include in its decision a statement of findings and conclusions and reasons or basis therefor on all material issues of fact, law or discretion

5. Post-Hearing Review

The Administrative Procedure Act also includes one provision relating to post-hearing review by the agency. When an appeal from or review of a hearing decision is made, the agency in its review of that decision has all of the powers that it would have had if it made the original decision; however, the agency may limit the issues on appeal or review by notice or by rule.[405] As with hearing decisions, before a decision is made on appeal from or review of a hearing decision, parties must be given the opportunity to submit proposed findings and conclusions or exceptions to recommended or tentative agency decisions.[406]

B. Social Security Act Requirements

Titles II and XVI of the Social Security Act includes provisions governing procedures used to determine eligibility for all of the disability programs covered by the Act.[407] Thus, there are a number of provisions applicable to administrative appeals which include specific requirements for reconsideration determinations, administrative hearings and Appeals Council review; in addition, certain requirements related to initial determinations and judicial review have an impact on the administrative appeals process. The Act also provides the Secretary with authority to promulgate rules and regulations governing the

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presented on the record, court of appeals is not disposed to overturn a sound administrative decision if the agency's path -- although not ideally clear -- may reasonably be discerned").

[404] 5 U.S.C. § 557(b). The initial decision for these purposes means "the first decision after evidence has been taken." Kerner v. Celebrezze, 340 F.2d 736 (2d Cir.), *cert. denied*, 382 U.S. 861 (1965).

[405] 5 U.S.C. § 557(b).

[406] *Id.* § 557(c). Parties can also file a supporting statement, and the proposed findings and conclusions or exceptions must be included in the record together with the agency's ruling. *Id. See* text accompanying note 400, *supra*.

[407] Title II of the Act governs the Old Age, Survivors and Disability Insurance Benefits program, which includes the Disability Insurance Benefits program for disabled wage earners, as well as programs for disabled widows, widowers and children of wage earners. *See* 42 U.S.C. §§ 401-433. Title XVI governs the Supplemental Security Income program, including benefits on the basis of disability. *See id.* §§ 1381-1384.

processing of claims, including the taking and furnishing of evidence to establish eligibility for benefits.[408] This authority has been construed as conferring "exceptionally broad authority to prescribe standards for applying certain section of the [Social Security] Act."[409]

The Act gives the Secretary of the Department of Health and Human Services general authority to decide individual claims for disability benefits.[410] The actual determination of disability, however, is made by state agencies under contract with the Social Security Administration. The authority for state agency determinations of disability is based on a request by the state to assume that responsibility, which all states have chosen to do.[411] State agencies are required to make disability determinations in accordance with relevant regulations and other guidelines promulgated by the Social Security Administration.[412] This authority to regulate state agencies is extensive, and includes the agency's administrative structure, staffing arrangements, performance criteria and fiscal control procedures.[413]

1. Notice

The Secretary's authority to decide, with the assistance of state agencies, individual claims for benefits includes the responsibility for providing certain notice. Thus, any determination unfavorable to a claimant must include with the decision "a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based."[414] A decision must meet these requirements for clarity and specificity in order to have *res judicata* effect.[415]

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[408] *See id.* § 405(a):The Secretary should have full power and authority to make rules and regulations and to establish procedures . . . which are necessary or appropriate to carry out [the provisions of the Act], and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the methods of taking and furnishing the same in order to establish the right to benefits hereunder.*See also id.* § 1383(d)(1).

[409] Heckler v. Campbell, 461 U.S. 458, 466 (1983) (quoting Schweilar v. Gray Panthers, 453 U.S. 34, 43 (1981)).

[410] 42 U.S.C. § 405(b)(1).

[411] *See id.* § 421(a). The Secretary has authority to monitor state agency performance and, if necessary, take over the responsibility from a state following notice and hearing. *Id.* § 421(b). The same procedures apply to Supplemental Security Income disability determinations. *See id.* § 1383b.

[412] *Id.* § 421(a)(2).

[413] *Id.*

2. Reconsideration

The Secretary's authority to make initial determinations includes the authority to establish a procedure for reconsidering initial decisions upon request from a claimant.[416] The only detailed requirements in the Act related to reconsideration procedures applies to cases where benefits are terminated based on a finding that the claimant is no longer disabled.[417] In such cases, claimants must be given the opportunity for an evidentiary hearing at the reconsideration level on the issue of disability.[418] The hearing, which must be "reasonably accessible" to the claimant, can be held by the state agency or by the Social Security Administration if the termination decision was made by a state agency; it must be held by the Administration if it made the termination decision itself. If the hearing is held by the state agency, it must be conducted by an adjudicatory unit separate from the unit which made the decision to terminate benefits; if held by the Administration, it must be conducted by someone other than the person who made the termination decision.[419]

3. Administrative Hearing

The Social Security Act entitles claimants to a hearing following an adverse determination on a disability claim.[420]

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[414] *Id.* § 405(b)(1). *See also id.* § 1383(c)(1). As stated in Heckler v. Day, 467 U.S. 104, 117 (1984), the Act requires "that every initial determination of ineligibility contain an easily understandable discussion of the evidence and the reasons for the determination".

[415] *See* Rogerson v. Secretary, 872 F.2d 24, 28-29 (3d Cir. 1989).

[416] The Act does not authorize reconsideration as such; authority is found in the regulations. *See* 20 C.F.R. §§ 404.907-.913. There are, however, extensive requirements authorizing and, under certain circumstances requiring, review of state disability decisions on the Secretary's own motion. *See generally* 42 U.S.C. § 421(c).

[417] A finding that a claimant is no longer disabled is to be distinguished from a determination based on eligibility requirements unrelated to disability, such as insured status.

[418] *Id.* § 405(b)(2). This provision does not apply to Supplemental Security Income claims; however, the Administration has extended it to that program by regulation. *See* 20 C.F.R. § 416.1414-.1422.

[419] 42 U.S.C. § 405(b)(2).

[420] *Id.* §§ 405(b)(1), 1383(c)(1). These two provisions, which apply to Disability Insurance Benefits under Title II and Supplemental Security Income under Title XVI, are "substantially identical." *See* Pulido v. Heckler, 568 F.Supp. 627, 628 (D. Colo. 1983), *rev. on other grounds*, 758

A hearing is required with respect to all issues for which the claimant's individual circumstances are relevant to the determination. On the other hand, a hearing is not required with respect to issues that can be resolved through the application of properly promulgated regulations.[421] Also, a second hearing is not required when a case is remanded for further administrative proceedings, even when the remand is based on a failure to consider certain medical evidence.[422] Hearings are required on an appeal from an adverse decision on eligibility; however, a refusal to reopen a previous application is not a "decision" for these purposes and therefore a hearing is not required.[423]

To a certain extent, the provisions of the Social Security Act applicable to disability appeals track the relevant provisions of the Administrative Procedure Act. The Supreme Court addressed this point in *Richardson v. Perales*,[424] after declining to decide whether the Administrative Procedure Act applies generally to Social Security disability claims:

> We need not decide whether the APA has general application to social security disability claims, for the social security administrative procedure does not vary from that prescribed by the APA. Indeed, the latter is modeled upon the Social Security Act. . . . The cited [5 U.S.C.] § 556(d) provides that any documentary evidence "may be received" subject to the exclusion of the irrelevant, the

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F.2d 503 (10th Cir. 1985). The right to a hearing applies equally to decisions by state agencies and by the Social Security Administration. *See* 42 U.S.C. § 421(d) ("any individual dissatisfied with any determination [by a state agency] . . .shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in [42 U.S.C. § 405(b)] with respect to decisions of the Secretary").

[421] Thus, in Heckler v. Campbell, 461 U.S. 458 (1983), the Supreme Court upheld the practice of making eligibility determinations according to the Social Security Administration's Medical-Vocational Guidelines: "It is true that the statutory scheme contemplates that disability hearings will be individualized determinations based on evidence adduced at a hearing. . . . [E]ven where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration." *Id.*, at 467.

[422] *See* Pagan v. Secretary, 819 F.2d 1, 4 (1st Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 713 (1988) (administrative law judge reconsidered evidence on remand without a hearing and again denied claim).

[423] *See* Califano v. Sanders, 430 U.S. 99, 108-09 (1977).

[424] 402 U.S. 389, 408-09 (1971).

> immaterial, and the unduly repetitious. It further provides that a "party is entitled to present his case or defense by oral or documentary evidence . . . and to conduct such cross-examination as may be required for a full and true disclosure of the facts" and in "determining claims for money or benefits . . . an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."
>
> These provisions conform, and are consistent with, rather than differ from or supercede, the authority given the Secretary by [42 U.S.C. §§ 405(a), (b)] "to establish procedures," and "to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits," and to receive evidence "even though inadmissible under rules of evidence applicable to court procedure." Hearsay, under either Act, is thus admissible up to the point of relevancy.

Nonetheless, these separate provisions of the Social Security Act should be discussed, as well as other provisions with or without counterparts in the Administrative Procedure Act.

Upon request by a claimant, the Social Security Administration must provide to the claimant "reasonable notice" and the opportunity for a hearing.[425] When a hearing is requested and held, the hearing decision must be based on the evidence presented and compiled at the hearing.[426] The Act also requires that a hearing be held within a reasonable period of time.[427] However, in light of the fact that Congress has never imposed specific time limits for processing Social Security disability appeals, the Supreme Court has held that "it would be an unwarranted intrusion into this pervasively regulated area for federal courts to issue injunctions imposing deadlines with respect to future disability claims."[428]

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[425] 42 U.S.C. §§ 405(b)(1), 1383(c)(1).

[426] *Id.* The hearing must be requested within sixty days after receipt of notice of the adverse determination. *Id.*

[427] *See* White v. Mathews, 559 F.2d 852, 859 (2d Cir.), *cert. denied*, 435 U.S. 908 (1977). In a later case, the Secretary acknowledged this timeliness requirement. *See* Heckler v. Day, 467 U.S. 104, 111 (1984) ("The Secretary does not challenge her the determination [by the lower court] that [42 U.S.C.] § 405(b) requires administrative hearings to be held within a reasonable time").

The Act confers on the Secretary authority to hold hearings at which the person conducting the hearing can administer oaths, examine witnesses and receive evidence.[429] Claimants must also be given the opportunity to cross-examine adverse witnesses and, if evidence is obtained by the administrative law judge after the hearing, must be allowed not only to review and comment upon that evidence but also to subpoena and cross-examine the source of the evidence.[430]

The formal rules of evidence are not to be applied at these hearings: "Evidence may be received at any hearing . . . even though inadmissible under the rules of evidence applicable to court procedure."[431] Not only can hearsay evidence be admitted, but an adverse determination can be based on hearsay evidence alone, including written medical reports, so long as the claimant has the opportunity to subpoena and cross-examine the source of the evidence.[432] Although the Act states only generally that hearing decisions must be based on the evidence compiled at the hearing, a substantial evidence standard for hearing decisions is written into the provision authorizing judicial review. Thus, only findings of fact supported by substantial evidence are considered conclusive for purposes of judicial review.[433] This "substantial evidence" standard has been defined by the Supreme Court as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[434] Courts have also required administrative law judges to set forth in their decisions the evidence supporting their decisions, and evidence being discounted.[435] Decisions with insufficient detail have been found to violate the Act's requirement for clear and understandable determinations.[436]

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[428] Heckler v. Day, 467 U.S. at 119. *See also* Littlefield v. Heckler, 824 F.2d 242, 246-47 (3d Cir. 1987) (rejecting arguments on delay based on the Social Security Act and the Administrative Procedure Act, citing *Day*. Supplemental Security Income hearing decisions must be made within ninety days, except for claims requiring a determination of disability. 42 U.S.C. § 1383(c)(2).

[429] 42 U.S.C. §§ 405(b)(1), 1383(c)(1).

[430] Thus, in Richardson v. Perales, 402 U.S. 389, 402 (1971), the Court upheld the use of written medical reports in Social Security disability hearings, recognizing that claimants have the right to subpoena and cross-examine the physician who authorized the report. *See also* Wallace v. Bowen, 869 F.2d 187, 192 (3d Cir. 1989) ("We construe *Richardson* as holding that an opportunity for cross-examination is an element of fundamental fairness of the hearing to which a claimant is entitled under . . . 42 U.S.C. § 405(b)"). *Wallace* involved the use of post-hearing evidence, and the court concluded that "it is unmistakable under the statute that the Secretary may not rely on post-hearing reports without giving the claimant an opportunity to cross-examine the authors of such reports, when such cross-examination may be required for a full and true disclosure of the facts." *Id.* *See also* Allison v. Heckler, 711 F.2d 145, 146 (10th Cir. 1983) ("An ALJ's use of a post-hearing medical report constitutes a denial of due process because the applicant is not given the opportunity to cross-examine the physician or rebut the report"); *id.* at 147 ("Moreover, such practice exceeds the Secretary's statutory authority. The Secretary is clearly mandated by statute to determine a claimant's disability 'on the basis of evidence adduced at hearing'") (quoting 42 U.S.C. § 405(b)(1)).

[431] 42 U.S.C. §§ 405(b)(1), 1383(c)(1).

[432] *See* Richardson v. Perales, 402 U.S. at 402 ("a written report by a licensed physician . . . may be received as evidence in a disability hearing and, despite its hearsay character . . . may constitute substandard evidence supportive of a finding . . . adverse to the claimant, when the claimant has not exercised his right to subpoena [and cross-examine] the reporting physician").

The provisions of the Social Security Act governing judicial review also affect the extent to which records are closed at the administrative hearing level. Thus, the Act provides that additional evidence cannot be submitted in support of a claim on judicial review. If a claimant or the Social Security Administration wants to submit additional evidence to the court, the court can only remand the case for further administrative action.[437] Moreover, the court is authorized to remand a case under such circumstances only if the new evidence is "material" and if there was "good cause" for the claimant or the Administration to have failed to introduce the new evidence at the hearing, or, if appropriate, to the Appeals Council.[438]

4. Appeals Council

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[433] 42 U.S.C. § 405(g). *See also id.* § 1383(c)(3) (applying § 405(g) to Supplemental Security Income claims).

[434] Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 302 U.S. 197, 229 (1938). The substantial evidence standard of 42 U.S.C. § 405(g) has been described as "precisely the same" as the standard of the Administrative Procedure Act. *See* Ginsburg v. Richardson, 436 F.2d 1146, 1148 (2d Cir.), *cert. denied*, 402 U.S. 976 (1971).

[435] *See, e.g.*, Stephens v. Heckler, 766 F.2d 284, 287 (7th Cir. 1985) ("the ALJ must mention and discuss, however briefly, uncontradicted evidence that supports the claim for benefits"). *Cf.* Zalewski v. Heckler, 760 F.2d 160, 166 (7th Cir. 1985) (require only "a minimal level of articulation by the ALJ as to his assessment of the evidence . . . in cases in which considerable evidence is presented by the claimant").

[436] *See, e.g.*, Vasquez v. Heckler, 736 F.2d 1053, 1054 (5th Cir. 1984) (failure to state basis for a required finding violates 42 U.S.C. § 405(b)(1)). *See generally* text accompanying notes 414-15, *supra*.

[437] 42 U.S.C. § 405(g).

[438] *Id.*

The Act does not include separate requirements for Appeals Council review. However, a number of the important requirements relating to proof at the administrative hearing level apply equally in those cases which proceed to the Appeals Council. Thus, Appeals Council decisions must be supported by substantial evidence.[439] Similarly, any evidence that could have been submitted to the Appeals Council would be subject to the limitations on submitting additional evidence on judicial review.[440]

V. SUMMARY AND RECOMMENDATIONS

A. SUMMARY

One can see from the material presented in parts II and III of this report that there are a number of alternatives to the structure of the Social Security Administration's administrative appeals process which may be of some use in considering recommendations for reform. There are, of course, reasons for many of the differences in administrative appeals procedures found in other federal disability programs which would counsel against adopting those different procedures for the Social Security Administration.[441] Nonetheless, certain aspects of the administrative appeals process used in other programs do provide some interesting possibilities that could be considered for the Social Security program.

The most significant ways in which the administrative appeals process differs in other federal disability programs from that used by the Social Security Administration can be summarized broadly, together with the major suggestions for change recommended by the Administrative Conference of the United States in previous reports.[442] It will be most helpful to present this summary material according to the different steps of the appeals process found generally in all programs: administrative review prior to hearing, administrative hearing, and final administrative review. This material is also presented in the form of charts in appendices to this report. There is a series of charts (Appendix A) showing the flow of the administrative appeals process for each program considered in this report. In addition, a separate chart (Appendix B) shows the major features of the process for all programs in an effort to facilitate comparative analysis.

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[439] The judicial review provision relating to substantial evidence discussed at text accompanying note [old IV 76], *supra*, applies to "[t]he findings of the Secretary," which includes Appeals Council determinations. *See id.*

[440] *See* text accompanying note 437, *supra.*

[441] Most obviously, there are significant differences in the disability standard applied in all of the other programs included in this report, except for the Railroad Retirement program. Thus, procedures beneficial to a determination of the presence of pneumoconiosis in a Black Lung claim, which may also require the participation of a third-party coal mine operator, may have little meaning for adjudicating Social Security disability claims.

[442] The Administrative Conference's recommendations are summarized in a different format in Section IV(B) of this report, *supra.*

1. Administrative Review Prior to Hearing

Procedures used in other disability programs to review decisions prior to a hearing are quite similar to those used by the Social Security Administration. One difference is that reconsideration in the Civil Service disability program is limited to the record compiled for the initial application. Another difference, found in the Veterans and Black Lung programs, is to give the claimant the option of seeking reconsideration or proceeding directly to an administrative hearing. A separate reconsideration step is not required by the Administrative Procedure Act or the Social Security Act.[443] The Administrative Conference has made some recommendations that contemplate the elimination of reconsideration in Social Security cases.

In most programs, reconsideration takes place following the completion of a separate process for initial determinations. In the Black Lung program, however, the reconsideration procedure is in effect an optional extension of the initial decision process. Claimants are provided an initial decision which identifies deficiencies in the record and invites the claimant to submit the missing evidence rather than request an administrative hearing. If new evidence is submitted, then a new decision is made much like a reconsideration decision in the Social Security program.

There are also differences in the format in which reconsideration decisions are communicated to claimants.[444] For most programs the notice is similar to that used by the Social Security Administration, in which a brief rationale is included covering any new evidence submitted as part of the reconsideration process. A more elaborate notification procedure is used in the Black Lung program in which a proposed decision and order is submitted to the claimant who may request a revision of particular findings of fact and conclusions of law.

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[443] There is a requirement for a "disability hearing" in the Social Security Act for certain cases which is to take place at the reconsideration level. *See* text accompanying notes 418-19, *supra*.

[444] Generally, the format used for reconsideration-type decisions is the same as used for initial decisions. The initial decision process is discussed in part II of this report. *See* text accompanying notes 14-31, *supra*.

2. Administrative Hearings

The general model for administrative hearings is very similar for all programs included in this report. The Social Security Act and the Administrative Procedure Act clearly require that claimants be given the opportunity for a *de novo* hearing before an independent administrative law judge following an adverse decision on a claim for disability benefits. The most common differences relate to the requirements for initiating the appeal. Thus, a request for a hearing in the Civil Service disability program must include a statement of the basis for the appeal and the Office of Personnel Management must then respond with an admission, denial or explanation of the allegations in the petition. Although Civil Service hearings are *de novo* and new evidence is considered, evidence submitted to prove an entirely new basis for disability can be excluded. Hearing procedures for Veterans claims also utilize a more elaborate procedure for initiating the process. Claimants file a Notice of Disagreement, which is responded to by the filing of a Statement of the Case by the Administration including a summary of the law, regulations and evidence relevant to the claim. As with Civil Service hearings, there are certain limits on the submission of new evidence which was available but not submitted during the initial decision process. Moreover, in Black Lung appeals the issues at the hearings are limited to those identified in the initial decision or raised during the initial decision process, except for issues that could not have been reasonably ascertained at that time.

Hearings at the Veterans Administration are unusual in that they can be requested either during the initial decision process or only after an initial decision has been made. In practice, most hearings are requested only after the initial decision is made. In such cases, the claimant must file a Notice of Disagreement from the Notice of Decision. The content of the Notice of Disagreement need not be specific so long as it indicates the claimant's desire for a review of the decision. The department then responds to the Notice of Disagreement by reviewing the initial decision, and may develop additional evidence as part of this process. Then, if it decides to affirm the initial decision, it must issue a Statement of the Case which includes a justification for the decision in sufficient detail to allow the claimant to prepare an effective appeal.

Another major difference in the Black Lung program is that the administrative hearing is fully adversarial. This explains some of the formality in the procedures used to frame issues on appeal. Civil Service disability claims are also considered adversarial; however, the Office of Personnel Management does not pursue these claims aggressively. Prehearing conferences are used regularly in Civil Service cases to frame issues and, when possible, resolve matters without a hearing. The Administrative Conference has recommended more extensive use of prehearing conferences and better development of medical evidence prior to hearings by Social Security Administration administrative law judges.

3. Final Administrative Review

The Merit Systems Protection Board and the Benefits Review Board provide significantly more limited review of Civil Service and Black Lung claims than is the case with the Social Security Administration's Appeals Council. Although the rules are softened somewhat in practice, the Merit Systems Protection Board reviews decisions only when new and material evidence is presented that was not available when the hearing record was closed or if there was an error in interpreting applicable law. Similarly, the Benefits Review Board reviews decisions by administrative law judges according to a substantial evidence standard, without receiving any new evidence, or to determine whether the decision is consistent with applicable law. The Administrative Conference has recommended that the Social Security Administration's Appeals Council move in this direction, limiting itself to review on the record of only selected cases raising important and difficult issues.

Hearings before the Board of Veterans Appeals are entirely different. Additional documentary evidence can be presented, and hearings are held at which witnesses are allowed to testify. Moreover, the Board has the authority to request an expert medical opinion from an independent medical expert in order to clarify the record.

Some programs require claimants to follow relatively formal steps to initiate a post-hearing administrative appeal. Thus, appeals to the Benefits Review Board are initiated by filing a written notice of appeal followed by a petition for review which must identify specifically the substantive issues involved in the appeal. The issues raised must be supported by a written memorandum or other statement, and the Board will generally not consider any issue not raised and briefed adequately by the party raising the issue. Appeals to the Board of Veterans Appeals also require the filing of a Substantive Appeal from a Statement of the Case issued following an adverse initial or reconsideration decision. A Substantive Appeal must identify all of the issues which the claimant wishes to raise; however, in practice this requirement is construed liberally.

The Merit Systems Protection Board and the Benefits Review Board publish precedential decisions which are distributed widely. The Administrative Conference has recommended that the Appeals Council do the same. By contrast, decisions of the Board of Veterans Appeals are specifically not precedential, and are available by mail on request.

B. RECOMMENDATIONS

It is apparent from the material presented in this report that certain improvements can be made in the Social Security Administration's administrative appeals process. Obviously, the Administration felt that some significant changes would be valuable when it prepared its extensive revisions draft in 1988.[445] The testimony and other evidence presented to the Disability Advisory Committee has confirmed this view. Presumably, the Disability Advisory Committee will present the Administration with extensive and detailed proposals for revising at least certain aspects of the administrative appeals process.

It is beyond the scope of this report to present comprehensive and detailed recommendations for reform. The Administrative Conference noted in its 1978 Recommendations that radical change in the Social Security Administration's appeals process was not warranted at that time. This remains true to a large extent today, except, perhaps, with respect to the Appeals Council. The present process is an open and informal one, consistent with the beneficient purposes of the Social Security Act. Although some more control may be needed over the flow and quality of appeals, too much structure could prove to be counterproductive, particularly for unrepresented claimants. Indeed, if the process becomes too formal, the participation of non-attorney representatives may have to be restricted or even precluded.[446] However, certain broad and general recommendations can be presented based on the practice in other federal disability programs and the prior reports and recommendations of the Administrative Conference in this area. All of the recommendations which follow are consistent with applicable provisions of the Social Security Act and the Administrative Procedure Act.

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[445] *See* Social Security Administration Draft Proposed Rules, *supra* note 2.

Recommendation No. 1: Establish a single initial decision procedure to replace the current two-step process of initial decision and reconsideration.

Although all programs include some process for reconsidering initial decisions prior to an administrative hearing, most invest significantly less time and resources to the reconsideration stage than does the Social Security Administration. In some programs, reconsideration is an optional step; in one program reconsideration is effectively an extension or continuation of the initial decision process. On balance, it seems that a separate, formal reconsideration process as used by the Social Security Administration is unnecessary. Instead, the resources used to implement the reconsideration level of review could be allocated more effectively to improving the initial decision process. It is not sufficient, however, simply to eliminate reconsideration. At a minimum, the types of changes in the initial decision process presented in the next two recommendations should be made in order to justify this change.

Recommendation No. 2: Add an optional face-to-face interview with the claimant as part of a revised initial decision process.

Most programs provide for a face-to-face interview with a decisionmaker only at the administrative appeals level, as does the Social Security Administration. One program does allow claimants to request a hearing as part of the initial decision process, although most claimants choose to wait to have a hearing only after an initial decision is made. Nonetheless, such an interview would be extremely helpful in improving the quality of initial decisions and thereby reducing the number of claims appealed to the administrative hearing level. It is on this basis that the Administrative Conference has supported the implementation of face-to-face procedures in its contingent recommendations on state agency action.

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[446] Non-attorney claims representatives are worried about this in the Veterans program with the advent of the Court of Veterans Appeals and the loosening of attorney fee restrictions in Veterans benefits cases.

> **Recommendation No. 3: Improve the development of medical and vocational evidence during a revised initial decision process by increasing communication between staff and claimants on the progress of the application, including the face-to-face interview.**

All programs encounter the problem of trying to make a disability determination on the basis of records which all too often are incomplete. Claimants are advised of the reasons for adverse decisions, but only one program provides claimants with notice of a potential adverse determination before the decision becomes final. Claimants should be informed when an adverse decision is likely and should be told specifically of any deficiencies in the record that led to the preliminary adverse determination. This could be done either in writing or in conjunction with a face-to-face interview. When it appears that a claim is likely to be denied on the basis of insufficient medical information, every effort should be made to complete the medical record before a final decision is reached. Medical staff should participate directly in this process of communication by seeking supplemental medical evidence and clarification of existing evidence from claimants and, when possible, from appropriate medical sources.

> **Recommendation No. 4: Improve the quality of formal initial decisions.**

A formal written decision including a statement of reasons and facts supporting the decision is required in all programs. However, the quality and detail of notices is, all too often, less than optimal; most notices are far less clear and informative than they can and should be. Every effort should be made to include as much relevant information as possible in the initial decision in order to allow the claimant to make an intelligent decision whether to appeal and, if the claimant decides to appeal, to be able to prosecute the appeal.

Recommendation No. 5: Improve the process for development of supplemental evidence at the administrative hearing level, including routine collection of updated medical reports from relevant medical sources.

All programs allow and encourage the submission of additional evidence during the administrative hearing level of appeal. The only significant limitations relate to the submission of technical evidence in the Black Lung program. Since gathering of additional evidence is such an important part of the administrative hearing process, the Social Security Administration should increase its efforts to obtain supplemental evidence obviously relevant to the appeal such as current progress reports from known medical sources. Special efforts should be made to obtain current information from the claimant's treating physician. In cases where the medical evidence appears to be particularly voluminous or complex, administrative law judges should be allowed to use medical experts to assist in deciding whether further medical development is needed.

Recommendation No. 6: Increase the use of prehearing conferences to frame the issues involved in the hearing, stipulate matters not in dispute, and decide appropriate cases without hearings.

Prehearing conferences are not used regularly in most programs; however, when they are used they are found to be very effective. Depending on the agenda for the conference, staff attorneys could be used instead of administrative law judges. Any matters of substance discussed at the prehearing conference should be included in the record. Although use of prehearing conferences should be encouraged, they should not be mandatory. Judges and claimants should be given the option to implement the goals of a prehearing conference by letter or telephone, when appropriate. If prehearing conferences are to be used more regularly, the Administration must provide additional funding and staff to support this activity which, in turn, could result in lower expenditures later in the process.

Recommendation No. 7: Improve the effectiveness of administrative law judges' subpoena power.

Although most judges conducting administrative hearings are authorized to issue subpoenas, they are generally hesitant to do so. Social Security Administration administrative law judges should be encouraged to issue and enforce subpoenas, and their authority to do so should be strengthened. In addition, administrative law judges should be required to issue subpoenas in certain situations, such as where important medical evidence cannot be located or obtained from a known medical source. Also, subpoenas should be issued whenever needed to obtain evidence to fill in gaps in the record identified at a prehearing conference.

Recommendation No. 8: Close the administrative hearing record at a set time after the evidentiary hearing.

All programs allow for unrestricted submission of evidence at a hearing and, in most instances, the opportunity to submit evidence after the hearing for a limited period of time. Although claimants should be encouraged, through the use of prehearing conferences and otherwise, to submit as much evidence as possible prior to or at the hearing, the evidentiary record should not be closed until claimants are given the opportunity to obtain and submit additional relevant evidence. Similarly, administrative law judges should be allowed to request additional evidence to be submitted after the hearing. Once the record is closed, however, additional evidence should be allowed into the record only under limited circumstances and upon request to the administrative law judge.

Recommendation No. 9: Improve the quality of hearing decisions.

Administrative hearing decisions should be written in a manner that communicates fully and effectively the basis for the decision, so that the claimant can make an informed choice as to whether to appeal. In some programs, claimants are required to specify the issues they wish to raise on an appeal from an administrative hearing decision. However, this type of requirement is enforced only in programs where the process is fully or partially adversarial. Even with improved administrative hearing decisions, requiring claimants to specify issues to be raised on appeal would be inappropriate for the Social Security program. Unrepresented claimants would be put at a severe disadvantage, and claimants' lawyers would be encouraged to file a comprehensive, and often overly comprehensive, list of objections in order to avoid problems of waiver.

> **Recommendation No. 10: Establish a procedure for petitioning administrative law judges to reopen or amend administrative hearing decisions within one year when there is new and material evidence available that relates to the period covered by the prior hearing.**

Although the record should be closed within a period of time set after the hearing, claimants should be given the opportunity to present new and material evidence obtained after the hearing record is closed, at least for a reasonable period of time such as one year. Claimants could be required to provide a reason why the evidence was not submitted earlier, in order to assure that evidence actually available at the time of the hearing was not withheld intentionally. The evidence would have to relate to the period covered by the original hearing record; otherwise, a new application should be filed.

It is preferable to have this evidence submitted to the administrative law judge who could determine if the evidence satisfies the new and material standard, rather than allow this evidence to be submitted at a subsequent level of administrative review. This "new and material evidence" standard should be construed liberally, so that claimants who make an effort to obtain and submit new evidence relevant to their claim will have the opportunity to have all relevant evidence considered. Any reasonable explanation as to why the evidence was not submitted earlier should be sufficient to allow reopening or amendment at this level; this requirement should be construed less strictly than the comparable requirement for submitting new and material evidence at the district court. If a claim is reopened or amended, a new decision would be made, with or without another hearing, and a new appeal period would be available to seek review at the Appeals Council.

> **Recommendation No. 11: Limit Appeals Council review to the record compiled at the administrative hearing level, unless the claimant seeks review of an administrative law judge's refusal to reopen the record for the submission of new and material evidence.**

In most programs, the final administrative review process is essentially a limited appellate review of the administrative hearing record and decision. When claimants are given every opportunity to present all relevant evidence at the hearing level and, if necessary, to submit additional evidence on a petition to reopen, there is no reason to require the Appeals Council to consider additional evidence. This recommendation is the logical counterpart to the previous recommendation. However, in addition, the Appeals Council could be given authority in exceptional cases to remand a claim for a hearing on a request to reopen even if the one year period for a petition to the administrative law judge has passed.

> **Recommendation No. 12: Authorize Appeals Council to use staff or lower level Council members to deny a request for review, and limit the review of cases by the Appeals Council to those raising significant policy issues.**

The Appeals Council cannot be expected to assume a meaningful individual review function for all claims that might be presented to the Appeals Council. In most other programs, the number of claims presented to the final administrative review level are significantly fewer, and even then most routine cases are simply denied the opportunity for full review. This recommendation tracks the central recommendations of the 1987 Administrative Conference recommendations on the Appeals Council.

> **Recommendation No. 13: Require Appeals Council to publish precedential opinions.**

The two most rigorous administrative review bodies involved in disability adjudications, the Merit Systems Protection Board and the Benefits Review Board, both publish widely available precedential opinions. The Appeals Council could do likewise if it limited its review function as suggested in the previous recommendation. This recommendation also tracks the 1987 Administrative Conference recommendation on Appeals Council opinions.

DECISION FACTORIES:

The Role of the Regional Processing Facilities in The Alien Legalization Programs

Written for the
Administrative Conference
of the United States

Written by
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March, 1989

This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the authors, and do not necessarily reflect those of the Conference or its committees.

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INTRODUCTION

Knowing that literally millions of individual decisions are currently being made about millions of newly-legalized aliens, the Administrative Conference of the United States asked TransCentury Development Associates to examine the operation of the four Immigration and Naturalization Service (INS) entities making these decisions. These are called Regional Processing Facilities (RPFs) by INS and decision factories by the authors.

This report follows earlier reports made by the same authors for the Administrative Conference, and the Ford Foundation,[1] regarding earlier stages of the alien legalization programs which had been set in motion by the passage of the Immigration Reform and Control Act of 1986 (IRCA)[2]. This report summarizes the progress of the alien legalization programs to date (the last filing deadline, for the farmworkers' part of the program, ended on November 30, 1988) and describes in some detail the structure and function of the RPFs.

TDA is grateful to a number of individuals, in INS, in other immigrant-serving agencies, and in the immigration bar, for the thoughtful responses they gave to our questions. These were asked as we visited more than two dozen local INS legalization offices, all four of the decision factories, and numerous related institutions. We owe a special note of thanks to Terry O'Reilly and Aaron Bodin of Central Office, and to the four RPF managers, who were most generous with their time: Joe Thomas in the Western Region; Jim Bailey, Northern; Gil Tabor, formerly Eastern, now at the Eastern RSC; and Lewis De Angelis (acting director) Southern. We are thankful to Bonnie Flanigen of the TDA staff for her abilities with concepts, words, numbers and editorial production. None of these words and numbers would have been set on paper without the financial support

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[1] See North and Portz, *A Review of the Decisionmaking Process in the Alien Legalization Program Established by the Immigration Reform and Control Act of 1986*, TransCentury Development Associates (TDA), Washington, 1988, and *Through the Maze: An Interim Report on the Alien Legalization Program*, TDA, Washington, 1988.

[2] Pub.L. 99-603.

of the Ford Foundation and the Administrative Conference. The authors alone, however, are responsible for what follows; it is a report *to* the Administrative Conference, not *by* it.

I. AN OVERVIEW OF THE ALIEN LEGALIZATION PROGRAM

If one were to mix the Emancipation Proclamation with IRS form 1040, or stir the granting of the franchise to women with the issuance of drivers' licenses to teenagers needing to prove their age, one would get a rough picture of the significance -- and the complexities -- of the alien legalization programs created by IRCA.

The 13th and 19th Amendments opened new doors, respectively, for 4.5 million slaves and 50 million women; Congress achieved these breakthroughs in, respectively, 43 and 42 words. No one needed an army of adjudicators to determine who had been slaves and who were women (though enforcing the rights of both groups has keep many a judge busy ever since.)

But granting legal status to nearly three million previously undocumented aliens has proved to be a different kind of task. Congress took 100 pages to spell out IRCA, including provisions on other, related issues; and more than one thousand total legalization staff government and contract people continue to sort through the alien applicants and their paperwork.

A. Origins, Eligibilities and Benefits

The origins of the legalization segments of IRCA have been described more fully elsewhere[3] but they can be summarized briefly here. After more than a decade of debate the 99th Congress decided that the country needed to take two different kinds of actions to reduce the size of the illegal alien population: (a) employers were to be fined (sanctioned) in the future, for hiring undocumented workers while (b) the more senior of the illegal aliens in the country were to be given an opportunity to file for legal status. This package of proposals constituted the heart of the Immigration Reform and Control Act which was signed into law on Nov. 6, 1986.

Although IRCA created a couple of lesser legalization programs as well, the two principal ones were for aliens who had been in the nation since January 1, 1982 (the section

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[3] See, for example Meissner, Doris, and Demetrious Papademetriou *The Legalization Countdown: A Third Quarter Assessment*, Washington DC: The Carnegie Endowment for International Peace, 1988, as well as the two reports cited in footnote # 1.

245A program) and for alien farmworkers, who had worked in specified agricultural employment for at least 90 days in a period ending May 1, 1986. The latter is the Special Agricultural Worker or SAW program.

Although there are substantial differences between the two programs, they have the following in common:

- aliens seeking legal status had to apply in person at INS offices where they went through personal interviews;

- they had to submit to a medical examination, blood test and x-ray procedure;

- they had to submit multi-part application forms as well as supporting documentation;

- the process was an expensive one, with government fees, medical and photography expenses as well as, in many cases, charges made by counseling organizations;

- those whose applications were approved receive a newly-created legal status, that of temporary resident alien (TRA); this status is clearly better than that of an illegal alien, but not as good as that of an immigrant (permanent resident alien status);

- in addition, both programs (section 245A and SAW) have been subject to much controversy and numerous court cases.

The section 245A application period (for aliens who had lived in the U.S. since January 1, 1982) opened on May 5, 1987 and closed twelve months later. The SAW program started on June 1,, 1987 and closed on November 30, 1988. The application fee for each program was $185, with fees being capped at $420 for nuclear families.

The benefits of the two programs were not identical, with farmworkers receiving a much more attractive package than those in the 245A program, but again, these elements were common:

- temporary resident alien (TRA) status may lead to permanent resident alien status and on to naturalized citizen status;

- both SAW and 245A applicants, after interview, were usually granted short-lived work authorization cards; following granting of TRA status they secured a longer-lived work authorization card;

- both groups can, under different circumstances, travel legally into and out of the U.S.;

- both groups were encouraged, at the time of application, to straighten out their often muddied relations with the Social Security system;

- both groups have only limited access to public assistance programs while in TRA status;

- neither group can use the TRA status to seek immigrant visas for their relatives;

- most previous immigration law violations were not held against either group, and data secured in the application process could not be used for any other governmental (or private) purposes.

In summary, two different groups of undocumented aliens were invited to apply for a fairly complex, somewhat expensive program; the very large majority of applicants who were found qualified received substantial benefits, but not quite as attractive as those available to the usual flow of immigrants; there were different eligibility standards, application windows and benefit packages (as spelled out subsequently) for the 245A and the SAWs applicants.

B. The Application Process

To obtain a better appreciation of the alien legalization program in general it is useful to follow a couple of imaginary applications through the decision-making process.

The Case of Agnes B. A Section 245A application was filed in November, 1987, by Agnes B. A woman in her thirties, with one Mexico-born child and two younger U.S. Citizen children, she went to one of the INS-licensed assistance agencies (termed Qualified Designated Entities (QDEs) by the legislative draftsmen). She brought along a shoebox full of documents, some useful to her cause, some useless. The QDE case worker sorted through the box, and pulled out (for photocopying) a set which depicted Agnes' life in detail. There was her birth certificate from Mexico; the 12-year-old U.S. marriage license; her husband's old Texas driver`s license (they moved to Indianapolis last year); an El Paso Independent School District report card for the oldest child, fortunately dated June 2, 1981; an INS document showing her one brush with the Border Patrol; birth certificates for the two U.S.-born children; several doctor's bills; some pay stubs and rent receipts; the insurance on the family car, dated July 1, 1983, and more. Agnes had the money she needed for her own application ($185) and the $50 for the oldest child. As was often the case, this was a family with mixed immigration statuses; while mother and oldest son were undocumented, the father had a green card and the younger children were U.S. citizens.

The caseworker helped her fill out the I-687 application forms[4] for herself and her son. Then Agnes carried that form, the checks, the photos and the medical examination off to the nearest Legalization Office (LO). (There were 107 of them at the peak of the program.) Since she was living in Indianapolis at the time she was in luck -- there was a nice big office with few applicants and she had an immediate interview. Elsewhere she might have had to wait for months.

The INS adjudicator looked through her collection of documents, read the application carefully (there was no time pressure that day) and asked a few questions; she was satisfied that Agnes and her documents and her application meshed with one another. The adjudicator marked "approval recommended" on the worksheet (I-696), gave Agnes a receipt for her checks ("feed her in" to use the INS term), walked her and her son over to a Polaroid camera, took her picture, and sealed the photo into a driver's-license-sized work-authorization card.

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[4] Most INS forms start with the letter I, for immigration. See Appendix for copies of this and other legalization forms.

Then Agnes and her application went their separate ways. Agnes and her son took their new documents, which came out of the sealer about the temperature of freshly-baked bread, and went home to wait for the next step.

The file was then sent to the national clearing center, in London, Kentucky, where a contracting firm key-punched the more important information from Agnes's application. The firm sent electronic messages off to a series of U.S. government index systems to see if any of them had any records on Agnes. Among the systems queried in this, and every other case, are the FBI master file on criminal activities, the Government's lookout book file for people they want to stop at the ports of entry, and several, not-yet-totally connected INS data systems.

Once these activities had been set in motion, Agnes' file was boxed up with dozens of others and sent overnight by Federal Express to another location not usually associated with immigrants, the basement of the federal building in Lincoln, Nebraska. Here Agnes' file was delivered to one of the decision factories we are describing, the Regional Processing Facility (RPF) for the INS Northern Region.

The file was logged in and was placed on a shelf for several weeks. Meanwhile, the query from London, Kentucky, produced no responses from any of the electronic files consulted. The FBI knew nothing about Agnes. None of the INS files reflected her one apprehension by the Border Patrol (which is not unusual for a single, non-aggravated apprehension). In the words of the RPF, there were no hits on her case, and since this was true, and since there was a recommendation for approval from the LO, her file went into the automatic approval category.

A sample of 10% of these cases are reviewed at the RPF, but Agnes' was not, and a letter was ground out telling her to come back to the Indianapolis LO for another card, this one indicating that she had been approved for TRA status.

Agnes regarded the letter with mixed emotions; it was neither attractively printed nor immediately scrutable (see Exhibit 1.) Worse, it was about her, and not about her and her son. Had she been approved, but her son denied? What had happened, as she would never learn, was that her son's file had been selected in the random quality review of the RPF; once the adjudicator saw the son's file he asked for the mother's as well, and it took some days before he got back to the youngster's case, which was quickly approved once it got to the top of the pile. (INS, like virtually every other government agency except those administering aid to families with dependent children, works through cases individual by individual, as each single person must qualify or not qualify on his or her own.)

Since Agnes, and, later, her son, were approved for Temporary Resident Alien status, she was effectively through phase one of the program, and would, later, as will the reader, face phase two.

The Case of Sam C. While Agnes B. was clearly eligible for section 245A TRA status, and was found to be eligible without difficulty by INS, the imaginary Sam C. presented a more troublesome case, for himself, and for the agency.

Sam is a 23-year-old single male from Belize. He now works in a store in Chicago which sells records and tapes, and rents videos, to a predominantly Jamaican clientele. He walks, talks and dresses like a city person. He says that when he first came to Chicago in 1985 he knew no one, and spent several months working for a Jamaican crewleader on the truck farms in Cook County south and east of Chicago. (Privately he is not sure that he worked as much as 90 days in the fields, but he is not sure that he did not; he does not share that information with anyone.)

When Sam heard about the alien legalization program he first learned of the 245A program, and knew that he was not eligible; after a while he learned that there was a farmworker program as well, so he looked up the QDE which had an office in the Belizian neighborhood of Chicago. He went up the steps and found a little office run by the local Chinese Benevolent Association; it did not have many Chinese applicants for legalization, but it had a thriving practice among the people from Belize who lived in the neighborhood. (The last sentence is *not* imaginary.)

The Chinese gentleman in charge was a little dubious about Sam; he looked pretty urban for a farmworker, but he told Sam that he needed at least some evidence, other than his own word, that he had worked in agriculture. "Go find that crew leader, and have him fill out the verification form" he said. Sam took the form (I-705) and started to look for the crew leader.

Agriculture crew leaders (or labor contractors, the West Coast term) are rarely mistaken for the pillars of the community; Sam was sure that his crew leader, Jonas D., had cheated him in several ways, and did a little illegal selling of liquor and pimping on the side. They had not parted friends. But Sam bit his lip, he looked up Jonas and asked him to sign the I-705.

Jonas had forgotten their quarrel, and may have forgotten Sam completely, but he was wise in the ways of the SAW program. He said that he thought Sam had worked for him, but would have to check his records; that would take a couple a days and it would cost Sam $150 -- if Sam came back on Monday with the money, Jonas would see what he could do.

Sam did not like Jonas, he did not like paying $150, but he felt he had no choice. He showed up with the money and Jonas signed the I-705 indicating that Sam had worked vegetables in the spring and summer of 1986.

Sam went back to the Chinese QDE where the rest of the application was completed. He then visited the Blue Island legalization office where he was interviewed by an adjudicator with no immigration experience, but some street wisdom; she knew about Mexican and Puerto Rican and Southern Black farmworkers but a Belizian? With those clothes? With those soft hands? But, on the other hand, he did know the difference between a hoe and a shovel, knew at least the most obvious facts about radishes, carrots, tomatoes and spinach. And he was not flustered. He knew he had worked for Jonas, and seemed consistent in what he said.

The adjudicator decided to do something that has happened frequently in the SAW program. She recommended that his application be denied on the worksheet (the I-696), checked that fraud was suspected, but at a low level (one point out of five) and then gave him the same work authorization card that Agnes had secured at the time of her interview. Sam was relieved to get the card, was happy that the difficult interview was over, and had no clue that he had been recommended for denial.

Sam's file was also sent to London, Kentucky, but the electronic queries received some responses. INS had a file on him for trying to push his way through the Brownsville, Texas, port of entry without being inspected. (This sometimes works during the rush hour.) He had been booked by the police after a tavern brawl, and his fingerprints were known to the FBI, but there was no conviction.

When Sam's file came up for adjudication in Lincoln, Nebraska, the INS staffer pricked up his ears. No single item was fatal, but the combination meant he had to look further. There was just one piece of documentation on farmwork, and that was signed by Jonas. The adjudicator asked the document fraud unit if they knew anything about him; the answer was yes, he had been known to do run a small-scale crew of farmworkers, but he had signed more than 60 I-705s, mostly for Pakistanis, and a couple of them had admitted to INS staff that they (a) had never worked for Jonas, and (b) they had paid $300 for the documentation. That did not mean that Sam had not worked in agriculture, but it looked suspicious. The RPF adjudicator asked Sam to provide additional support for his farmwork experience, and placed the file in the continuing category where it still sits.

Sam's case is not unique. Some farmworkers with genuine agricultural work experience have had to pay for documentation; some crewleaders with genuine farm experience sell documents, directly or indirectly, to people who have never worked for them; as a matter of fact, most people selling SAWs documents are, in fact, in agriculture. Making decisions about people with files like Sam's is very, very difficult, which is why there are so many pending cases.

If Sam gets through the process, however, he will be in better shape than Agnes. Since Congress set different, and less stringent requirements on farmworkers than on the 245As, Sam will float through the second phase of the legalization program while Agnes will continue to struggle, a subject to which we will return.

C. Decisions Made in the First Phase

There were two decisions to be made in every first phase legalization case: an individual one by the applicant to apply, and a governmental decision regarding the disposition of that application.

Much of the controversy about the first phase of the 245A program revolved around the first kind of decision. Was the program being run in such a way that the maximum number of eligibles were applying?[5] (Given the large number of SAW applicants, and the apparent presence of substantial fraud, there were few complaints that the SAW program was under-utilized by legitimate applicants.[6] In most cases, 245A eligibles decided that the expense and the bother of the program were overshadowed by the principal benefit -- the right to be a legal resident of the United States -- so they applied; we will never know how many 245A eligibles did not apply.

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[5] For more on this subject, see *Through The Maze*, pp. 46-55.

In numerical terms approximately 1.8 million people applied for the section 245A program, while another 1.2 million applied for the SAW program. Both of these totals were somewhat different from the predictions; there were fewer 245A applicants than many had predicted and far more SAWs. One reason for both of these differences may be that the SAW program required much less documentation and people eligible for both opted for SAWs. Another, less cheerful reason, is that the differential documentation requirements pushed (or lured) most of the fraudulent applicants into the SAW program. Certainly people working in both programs (those in and out of the government) agreed that fraud was a minor problem in the 245A program and a major one in the SAW program, particularly in the last half of the application period.

After the aliens decided to apply, what did INS decide to do with the applications? Nationally, as of Jan. 27, 1989, these were the statistics for the 245A and SAW programs:

	245As	SAWs
Total applications received	1,767,033	1,287,824
Approvals	1,311,560	332,210
Denials	28,439	21,674
Pending	427,034	933,940

These data require a little elaboration. The total number of applications are for those feed in by INS on January 27, 1989; a few more 245A applications may arrive, because of court decisions; thousands, perhaps tens of thousands of additional SAW applications will enter the system because they were still being processed by INS or by QDEs on that date.

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[6] For a typical journalistic account see Peter Applebome "Farm Laws Abused by Illegal Aliens," New York Times, Nov. 17, 1988. For more detailed coverage of the subject, written for immigration lawyers, see the frequent articles written in Interpreter Releases throughout the life of the program.

The final decisions shown above are those made at the RPFs, and do not relate to recommendations made at the Legalization Office level. (A more detailed analysis of decision-making, and appeals, at various steps in the process can be found in Chapter II.) We calculated the pending cases by subtracting the number of decisions from the number of applications filed; the pending cases fall into several subcategories including many freshly filed in the SAW program, many other cases awaiting interviews, many going through the normal process at RPFs, some categorized as continued -- awaiting additional documentation and, unfortunately, many SAW applications set aside for further scrutiny because fraud is suspected. Several thousand other cases are pending because they are covered by on-going, class-action litigation.

The numbers shown above indicated that the overwhelming majority of RPF-decided cases have been decided for the applicant; for the decided cases, 97.4% of the 245As have been approved, as have 92.6% of the SAWs. However, the approval rate for the SAW cases is likely to drop, as INS tackles both the late filers and the backlogged cases.

D. The Second Phase of the Legalization Program

The Requirements. Before addressing the public administration problems and public policy implications of the second phase of the alien legalization program, let us examine it from the rather different perspectives of Agnes (and her son) and of Sam (assuming he is found eligible in the first phase.)

They may not know that they have secured only *temporary resident alien* (TRA) status, and not the full-fledged *permanent resident alien* (PRA) status enjoyed by other immigrants, the ones with the green cards (I-551s). In the case of Agnes and her son, they must successfully complete another application process during a finite period of time or revert to illegal alien status. Sam is luckier: if he makes it through the first phase, he will be in TRA status, but he will convert automatically to PRA status without lifting a finger.

This discrepancy was caused by Congress setting different standards for urban and rural residents of the legalization program -- it clearly wanted the urban ones to learn some English and some civics and it clearly wanted to make it easier for farmworkers to apply for TRA status than for others to do so. (This tilting of the system was designed to meet the desires of California agri-business; that it happens to help a number of farmworkers is largely incidental.)

SAWs are treated differently, and better, than 245As on a long series of variables, not just in the much easier eligibility requirements and the longer window for applying. Whether or not the SAWs' more generous access to social service programs, to international travel, and the fact that they can skip the English and civics requirements made of 245As was deliberate is hard to determine. This is the case because the SAW provisions were written outside the normal path of legislation -- there were no hearings, markups or the like. The SAW provisions were hammered out in a series of negotiations by three Congressmen: two California Democrats, Howard Berman (who spoke for the workers), Leon Panetta (who spoke for the growers), and Charles Schumer (D-NY) who played the role of deal-maker. These three -- who happen to share a house on Capitol Hill -- then convinced the other principal legislative actors to include the SAW provisions at the conference stage after differing versions of the underlying bill had passed the two houses. At that point in the fall of 1986, with the elections looming, there was little opportunity to compare the detailed SAW provisions with those written for the section 245A applicants. The principal authors of IRCA, Senator Alan Simpson (R-WY) and Congressman Peter Rodino (D-NJ), were very unhappy with the SAW provisions but felt that they had to be inserted or else the bill would be defeated in floor votes[7].

Returning to Agnes; she became a TRA effective Nov. 10, 1987; 18 months later, on May 10, 1989, she will become eligible to apply for PRA status; on that date a one-year window opens. She must apply for PRA status during that time or on May 11, 1990 she will automatically revert to illegal alien status. While this fate is clearly spelled out in

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[7] This account is based on a series of conversations with those involved in this piece of legislative history.

IRCA, it is barely mentioned in some INS documents on the subject[8].

In order to secure PRA status, Agnes must do all of the following:

> - buy another group of three photographs of herself, for use in the production of the green card;
>
> - fill out and file another application (I-698); this is shorter than the previous one she completed, and requires less in the way of supporting documentation;
>
> - get another blood test, this one designed to detect AIDS;[9]
>
> - pay INS another $80; and
>
> - satisfy the English and civics requirements.

Agnes is worried about only one of these requirements, the last one. She is not aware that her English is more than adequate for these purposes; similarly, she probably knows more about American history and civics than she realizes, but she is concerned. The requirement in question, introduced by Speaker Wright in the House, is spelled out in the law:

> . . . The alien must demonstrate that he either --
>
> (I) meets the requirements of section 312(relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United State), or

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[8] Such as in the novella, or bi-lingual comic book, which INS has produced, "The Path to Permanent Residence."

[9] This applies to only a minority of the second round applicants, those who applied early in the first round. By December, 1987, the medical examination for applicants included the blood test for HIV-positive; everyone approved after that date has already been through that test.

> (II) is satisfactorily pursuing a course of study (recognized by the Attorney General) to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States. . .[10]

Agnes must satisfy this requirement, but her son belongs to one of the many classes of persons who are exempt. These include people under 16 (such as Agnes' son), those over 65, those who have lived in the country for more than 20 years and are over 50 years of age, and those who are physically incapable of reading, hearing or speaking.[11] Similarly people who have an American high school diploma, or have recently taken a full academic year in an American institution of higher education (including 40 classroom hours of civics instruction) are exempt from the requirement. But Agnes, like most 245A applicants, fits none of these categories. She has, at this writing, two principal options[12]:

> 1. She can go to the INS office and take the oral examination given to people seeking naturalization (this is called the section 312 examination and is administered by INS staff);

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[10] The Immigration and Nationality Act (INA) 245A (b) (1) (D) as amended by IRCA 201 (a).

[11] 53 Fed. Reg. pp. 43993-43997 (Oct. 31, 1988) (Amending 8 C.F.R. Section 425a.)

[12] Other options are likely to be available later, as INS works through its second round regulations. One of these is to take an examination designed and provided by the Educational Testing Service (the college board people), and another is to have a GED and have completed a self-study course. The requirements outlined in this text are based on the INS "Interim Rules and Regulations," published in the *Federal Register*, Vol. 53, No. 210, 10/13/88, pp. 43993-5.

> 2. She can take specialized classes from an INS-recognized organization in English and civics and secure, from that institution, a certificate that she has satisfactorily completed at least 40 hours of a course of at least 60 hours in duration.

The expectation is that most TRAs in Agnes' situation will enroll for the courses, secure the certificate, and avoid the uncertainties of the 312 examination. (That she can take the examination twice is not known to her, nor does she know that she can take the examination, and fail it, and then return with the 40/60 certificate.)

While there are now, and will continue to be, a morass of complex administrative and legal problems regarding who is, and who is not, eligible for the first round of legalization, the second round problems are probably going to be simpler, if no less serious. They are: (a) how many of the applicants, despite several rounds of INS mailings in English and Spanish, will simply not get the message, and will not apply, thus reverting to illegal status? and (b) will there be enough educational resources available, in the right places, to meet the demands of Agnes and her peers for the section 312 classes? One cannot imagine that there will *not* be court challenges to what presumably will be a small number of denials of PRA status[13], but the big questions appear to be not in the field of law, but in education and communications.

Neither of these are fortes of the Immigration Service. While it increased its ability to communicate with low-income, non-English speaking people during the legalization program (particularly in the Western Region), INS graphics are often less than inspired and INS copy is often wooden and legalistic.

As for education, that is a brand-new field for the Service; it has done a little regulating of vocational training institutions in the past, but it finds itself in the position of seeking to encourage the creation of a short-term program to help some 1.5 million people to learn enough English and civics to meet the 312 requirements.

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[13] INS officials, at all levels, say that they expect that there will be very few denials during the second phase of the program.

What INS has done, internally, to ease these problems, is to define "satisfactorily pursuing" in a remarkably liberal way. The reader is invited to remember a first year of language instruction, say the French class in the freshman year of high school. How much French did you know by the middle of November of freshman year? Not much, but if the classes were 50 minutes in duration, and five days a week, 40 hours of classes were completed before Thanksgiving.

INS is not demanding 40 hours of English, it is requiring 40 hours of English and civics. Further INS has made it possible for a wide range of educational institutions to offer these classes, and provide these 40/60 certificates. (Most schools will offer tuition-free 312 classes, with funding coming from the State Legalization Impact Grants program, which is also authorized in IRCA.)

As set by Congress, the 312 requirement applied to the Section 245A legalization applicants is an unusual one, neither demanded of the SAWs, nor of other American immigrants. INS, through its definition of "satisfactorily pursuing," has lightened the 312 burden as much as it possibly could.

While all of this is true, it is not clear how INS will handle a totally predictable problem: the last-minute rush for seats in the 312 classrooms. If history repeats, many of the phase two applicants, particularly the ones who signed up for the amnesty program at the last minute in May, 1988, will sign up for classes at the last minute in October and November 1990, at the end of their one-year-long window of opportunity. They will have started to pursue the mandated education, but they will certainly not be 40 hours deep in the subjects. How will INS handle these laggards? Probably gently, but INS is not making statements about that eventuality.

The Process. Let us return to Agnes's second round application, and assume that she has decided to take her chances with the oral 312 examination, the one that her cousin passed when she applied for citizenship a few years ago.

Agnes pulls together the application (a copy has been mailed to her house), the photos, the results of the blood test, together with the check for $80, and mails them, as directed to the RPF. She also assembles a similar package for her son, but because of his age he needs neither to pass the 312 or the blood test.

After her application has been logged in at the RPF an examiner will pull up her computerized file to see if there are new, and negative data on Agnes. (Apparently no effort will be made to run all the second round applicants through the FBI and other electronic filing systems.) The examiner finds nothing interesting on Agnes, notes that she has filed everything, and sets up an interview for her at the nearest legalization office.

Agnes is lucky, there is an INS office that can handle her claim in Indianapolis; had she lived in one of the Dakotas, on the other hand, she probably would have to go to Minneapolis for the interview. In the same moment that the interview is established by the RPF a form letter to Agnes is generated telling her when and where to report for the interview. Fortuitously Agnes' son is assigned an interview the same day.

When the day comes Agnes is nervous and worried about the test. She arrives at the office well ahead of schedule (this is not infrequent), and has time to grow more nervous, and to study, one more time, the numbering and the content of the amendments to the U.S. constitution.

The interview goes well, and Agnes finds most of the questions easy ones; the interviewer appears satisfied with her application and her command of English. Perhaps without explicitly telling her that she has passed he moves to the clerical elements of the encounter that indicate (to the examiner) that she has been approved. He needs two of the three photos that she had taken some time earlier for INS files; he stamps her TRA card to indicate that she is now a permanent resident alien, and tells her to look for the green card in the mail a couple of months later. (Agnes's son does not really have an interview, but the submission of the photos and the stamping of the card indicate that he, too, has become a PRA.)

Had Agnes opted to submit the certificate of satisfactorily pursuing the 312 course, her session in the INS office could have been similar to that experienced by her son.

Had Agnes failed to keep interview dates without justification, had she failed her 312 interviews, twice, or had she committed a felony, she would have been denied PRA status; that decision can be made in a legalization office, a district office, or at the RPF. In short, the final decision in the second round of the program, unlike those in phase one, may be made locally, and simply will be confirmed at the RPF decision factories, our next subject.

II. A DESCRIPTION OF THE REGIONAL PROCESSING FACILITIES

There are four Regional Processing Facilities (RPFs), one in each of the Immigration Service's four regions: Western, Northern, Southern and Eastern. (No other federal agency, to our knowledge, has four regions, most have ten.) The facilities are located respectively in Laguna Niguel, California; Lincoln, Nebraska; Dallas, Texas, and Williston, Vermont.

The Western Region, handling well over 50% of the nation's 245A and SAW applications, is the largest of these four facilities, with Southern being next in size, and Eastern and North being relatively small.

In the course of this chapter we describe the background that led to the creation of these decision factories, their structures and their functions. In the final chapter we weigh the strengths and the weaknesses of this kind of institution.

A. The Background

Making a large number of decisions regarding human beings seeking similar benefits (a Veteran's Administration loan, a Social Security pension or an income tax refund) has become a standard fixture in modern government. While legislatures make broad policy decisions, and courts mete out justice one case at a time, someone has to decide what to do with tens of millions of individual 1040s. That someone is the executive branch of government, and that process has been called "Bureaucratic Justice."[14]

The INS variation of bureaucratic justice, the RPFs which are the subject of this report, evolved slowly rather than being created in a single process.

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[14] This is the title of Jerry L. Mashaw's very helpful book on the subject (Yale University Press, 1983); more specifically, he examined the process by which the Social Security Administration decides claims for disability pension claims. These up-or-down decisions are made about 1.2 million times a year in a process which has many similarities to those followed in the INS decision factories.

Twenty years ago virtually all INS decisions on formal applications for benefits[15] of various kinds were made in the network of some 30 district offices, with only some appeals being decided at regional or national levels.

During the 1970s, and perhaps before, INS managers noted two separate work-load situations in widely-separated areas. Sometimes inspectors at the ports of entry, particularly on the northern frontier, had too little to do; this was particularly true during early-morning hours at 24-hour entry points. Meanwhile, adjudicators in big, immigrant-filled cities, had more paper work than they could handle. (Many INS cases, such as an application for a change in, or an extension of, nonimmigrant status, are routinely handled without direct contact with the applicant.)

If the inspectors had time on their hands and the adjudicators were overwhelmed, why not send some of the paperwork from, say the Boston District Office to the port of entry at, say Jackman, Maine. Since inspectors and adjudicators do similar work, and have similar training, it seemed to be a good fit. This process, which grew over the years, was called "remoting." (Soon the adjective, "remote," was converted into a transitive verb, as in "we remoted 435 cases this morning.")

The ad hoc remoting of cases to the ports of entry worked so well that it evolved into the creation of Regional Adjudication Centers (RACs). These were centralized places where adjudicators could make more or less standardized decisions on stacks of files; there was no public access to these evolving facilities, the phones did not ring often, and the RACs reported to the Regional Commissioners, rendering decision-making a little more consistent than it had been when those same cases were decided in the district offices, with the senior adjudicator reporting to the district director. The RACS are now called Regional Service Centers (RSCs).

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[15] INS runs a number of programs in which decisions are made to grant or deny a benefit that some individual or corporation wants in the immigration field; these include permission to admit the relatives of citizens or PRAs, grants of citizenship, issuance of travel documents to non-citizens, and extensions of legal presence of legally-admitted nonimmigrants. These decisions usually require at least three ingredients: (1) the application, usually on a prescribed INS form; (2) the alien's file (the A-file); and (3) an adjudicator to dispose of the case. Sometimes a face-to-face interview, as in naturalization cases, is needed as well.

In the 1980s Congress kept giving INS signs, mostly premature ones, that it was about to pass an immigration reform bill which would contain both employer sanctions and a legalization program. INS went through a couple of planning exercises before the bill was passed, and debated how to handle the anticipated flood of legalization applications. What kind of administrative structure should be created for this massive new program? Where should the decisions be made, at the local, regional or national levels?

A more pressing question quickly eliminated the possibility of the decisions being made at the district level. That question was: where will the applications be taken? Everyone quickly agreed that the district offices should not be used in the first stage of the legalization program, for two very sound reasons. First, the district offices were too crowded already, and could not take the additional traffic; secondly it was felt that the undocumented aliens, the potential customers, should be able to apply in offices where there were no immigration law enforcement functions; many probably would not apply if they had to go to the office where they, or their friends, had been processed for expulsion from the country. So it was decided to establish a new set of offices dedicated to the legalization program. INS proceeded to find, and to furnish attractively, 107 such offices. At this point, INS had two remaining options, a national decision factory (presumably to be co-located with the INS contractor's data processing facility in London, Kentucky) or four regional processing facilities along the lines of the existing RACs. The former alternative offered logistical convenience (less movement of files), economies of scale, and presumably a greater degree of consistency. If the latter alternative were adopted, however, the RPFs and the RACs could be merged subsequently, and the new organizations could make use not only of the lessons learned during the legalization program, but also the computers and other equipment purchased for that program. The regional commissioners strongly pressed for the second option, and carried the day.[16]

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[16] For somewhat similar local turf reasons, the first stage of the disability pension decision-making process takes place within state offices (the vocational rehabilitation agencies) though the program is totally funded by federal money. See Mashaw, *op cit., pp. 70, 162-163.*

B. The Structure of the RPFs Location

The atmosphere in the two kinds of offices handling legalization applications is radically different.

The local Legalization Offices we visited, particularly in busy periods, were for the most part warm, full of people, with a quiet bustle on the inside, and loungers and hawkers on the outside. The dominant language of the applicants was Spanish, which was also spoken by many to all of the staff. The Legalization Offices were often surrounded by vans selling food and soft drinks; usually a couple of representatives of rival medical examination services distributed flyers to all entering the office; sometimes immigration consultants set up shop on the sidewalk, and usually there was some guy fixing a sick car in the parking lot. In Fresno, the busiest of the SAW offices, one could obtain a physical examination in a trailer parked across the street from the INS facility.[17]

The four decision factories, however, are very different. They appeared quiet and neat; there were virtually no visitors, the phones were largely silent, the dominant language was English, and each facility, in its own way, is quite isolated.

The INS facility in California is in a handsome Government building regarded as a white elephant for years; the pyramid-shaped Chet Holifield Building overlooks an as yet-largely-undeveloped piece of Southern California real estate half way between San Diego and Los Angeles. The RPF offices in Lincoln, Nebraska, overlook nothing; they are in the basement of the federal building in that city.

The RPF in Dallas is in a major downtown high rise, but it takes persistence and a prior appointment to work one's way through the security systems, which do not seem to have much of a presence in the other three. The Eastern Region's RPF is located in a typical, accessible, one-story small town office building, but is in Williston, Vermont, a town with a population of less than 5,000. To some extent these different atmospheres are the result of deliberate INS decisions; legalization offices were placed in neighborhoods where applicants live; RPFs were designed to be quiet places for the handling of files and computers. But we wondered, are the RPFs too isolated from the gritty reality of the day-to-day legalization program?

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[17] Competition drove down the price of the medical examinations; one could get a blood test (including the AIDS screening), an X-ray, and the rest of the exercise for $50 in Fresno in November, 1988. The same examination cost more than $120 in other places, where there were fewer of them, but as little as $25 in Los Angeles at the end of the Section 245 program in May 1988.

Staffing. There are two separate staffs at each of the RPFs, operating in almost a caste system; there are the INS staff members who run the place and make all the decisions on the cases; and then there are the contract staff, who handle the voluminous paper and computer work. (The latter are employees of Appalachian Computer Systems, the firm which runs the central data entry facility in London, Kentucky.)

In the largest of the RPFs, in Laguna Niguel, there are about 300 staff members, some 160 with INS and the rest with the contractor. Of the INS staff there are 10 supervisors, some 90 adjudicators, and a number of investigators and clerks.

In the smallest, in Lincoln, there are 45 staff members; 25 on the INS payroll and 20 belonging to the contractor. Of the INS staff, there is the manager and four other supervisors, twelve adjudicators, six people in the document examination unit, and two clerks. In addition, co-located but not organizationally part of the RPF, there is an INS attorney and his clerk.

The RPFs are all managed by seasoned INS career people; and many, but not all of the supervisors, have prior INS experience as well. But most of the adjudicators were new to immigration when they were hired, though many had other government decision-making experience (e.g. there are numerous ex-Social Security people in these facilities.) The grade levels are GS-14 or 15 for the RPF managers, GS-11 to GS-14 for the supervisors, and GS-5 to GS-11 for the adjudicators.

Given the legal complexities of the program, one might expect a substantial presence of on-staff attorneys, or ready access to other INS attorneys. This is not the case. While there is an INS lawyer on the premises in both Lincoln and Williston there is none, at this writing in the Western Region, though a part-time attorney used to spend some time at the RPF. The RPF directors in the Western and Southern Regions do not lead lawyer-free lives, however, much of their time is taken in getting ready for court appearances in the many suits filed against INS by immigrant advocacy organizations (a subject to which we will return).

Staff specialization varies considerably from the larger to the smaller RPFs. All the adjudicators do everything, handling all types of cases (245As and SAWs), easy cases and tough ones, in the Eastern and Northern Region.

In the Western Region, however, there is a great deal of specialization, though routinely 245As and SAWs are not segregated during the first-round examinations. In Western Region there are half a dozen denial units, each with four or five adjudicators and a first-line supervisor, all reporting to another supervisor. One of these units, for instance, works with the oldest cases, those filed in the summer and fall of 1987, which have not been decided because of various complications. Another unit works on appeals, and others review denials made by journeymen adjudicators.

Relations with Other Parts of INS. Generally, in terms of direct line authority, the RPF managers report through the Regional Legalization Officer to the Regional INS Commissioner.

The situation is, however, a bit different in each region; the RPF managers are located in different buildings from the regional legalization officers in the Eastern, Southern and Western Regions, which tends to limit contact. Further, in the Northern Region, the Regional Legalization Officer makes his office in the Lincoln RPF, some 350 miles from the Regional Commissioner in the Twin Cities.

As to relations with the Central Office, all of the RPFs have steady contact with the INS Assistant Commissioner for Legalization, in the Central Office, and his two deputies, one for the 245A program and the other for the SAW program. The principal, or at least the most frequent, substantive conversations about the program tend to be between the RPF managers and one of the two deputy assistant commissioners in Washington. If an RPF manager needs legal advice, he usually follows this route, with the deputy assistant commissioner checking with a Central Office (CO) lawyer, and then calling the RPF back. (For a system making more than three million legal determinations it seems, to two non-lawyerly outsiders, to be an awkward way to get legal advice.)

Despite their isolation, the RPFs do have other regular relations as well, with the internal INS appeals unit, with (or primarily from) the Congress, and with the immigration bar.

IRCA established a one-step appeals system for the amnesty program (apparently there was dissatisfaction with the multiple-step system which operates in the rest of the immigration-management system). As a result, INS established an adjudicator-staffed Legalization Appeals Unit (LAU) which handles appeals from cases denied by the RPFs. An alien who, (1) is turned down by LAU *and* (2) becomes involved in a deportation hearing can take his case through the usual appeals channels of the immigration system, generally starting with an Administrative Law Judge and then moving into the federal courts. (Being denied legalization by the LAU or an RPF *never* automatically leads to deportation,[18] but an alien, as the Government works on different tracks, can find himself simultaneously losing his legalization case *and* facing deportation proceedings.)

Returning to RPF contacts with the LAU, there appear to be different patterns in different regions. The Northern Region regards the LAU as a group of appeals judges, and will not discuss the substance of cases with them; supervisors in the Western Region, looking for legal advice wherever they can get it, do call the LAU for advice. (The flow of cases between the RPF and the LAU is described later.)

We gather from both the RPFs and a couple of Congressional offices we have contacted that the flow of Congressional inquiries to the RPFs is very limited, and that the RPFs have established small units to handle such inquiries quickly.

The number of Congressional queries is not significant enough for it to be registered on the all-embracing RPF management information system; the managers of the Western and Northern RPFs estimated that they had no more than a single inquiry a day.

This stands in stark contrast to the experience of the agencies making disability pension decisions for the Social Security Administration; Mashaw says that more than 100,000 of the total of some 1.2 million cases handled annually are the subject of Congressional inquiries.[19] Since these cases are then expedited, the level of Congressional interest places a heavy burden on the system.

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[18] This is the case because of the privacy provisions of the legalization program; no information on an applicant, including the denial of an application, can be used against the alien by INS or any other arm of the Government. If the alien unsuccessfully used fraud in connection with his application, however, that can be used in both criminal and deportation proceedings.

Why are there so few inquiries in the legalization program? Two thoughts come to mind: first, virtually all the pension applicants are citizens and voters, as are none of the legalization applicants; secondly, most legalization applicants get a very tangible good immediately after their interview. They secure a work authorization card which takes care of their short-term employment problems. In contrast, the pension seekers get nothing until a decision is made.

The third set of RPF relationships are those with the immigration bar, and other immigrant advocates. The relationship between INS officials and the immigration bar has been the subject of numerous suits, carefully written accounts in the immigration law trade journal, *Interpreter Releases*, and an irreverent article in the *New Yorker*.[20] Sometimes INS is very open with the bar, as it clearly was in the process of writing regulations for the legalization program; and sometimes it is uncommunicative, particularly on individual cases.

The first variable is the question of a telephone number. The Eastern and Western RPFs have published their phone numbers and have assigned clerks to answer those phones. The Northern Region has not published its number, but talks to lawyers who have managed to secure the phone number. Several numbers are in circulation for the Southern Region -- according to one lawyer "some may even be connected." There are however, complaints about getting through, calls not being returned, and a general lack of accessibility.

C. The Functions of the RPFs

General Considerations. The primary function of the RPFs is to say "yes" to the overwhelming majority of legalization applicants, while sorting out a small minority of cases for denial.

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[19] Mashaw, *op cit*, pp. 58, 59, 71 and 78.

[20] Calvin Trillin. "Profiles -- Immigration Lawyers: Making Adjustments," *New Yorker*, 5/28/84, pp. 50-71.

This is both consistent with other INS decision-making operations, and quite different from the situation in the disability pension system described in *Bureaucratic Justice.*

In that program about half the applicants secure pensions, and half do not; given the large numbers of denials, the appeals mechanism plays a much larger role in the disability system than it does in the legalization program.

The high approval rates in the RPFs--though one would not know it from discussions with immigration lawyers--are typical of INS decision-making operations. More than 99% of those seeking admission at the ports of entry go through the gates; more than 90% of those pressing their citizenship application to a decision are naturalized.[21] Most applications for other benefits are approved.

But while INS usually says yes, it does not always do so, nor does it have a totally free hand. The American immigration service operates with much more complex and detailed statutes than any other in the world; elsewhere the minister, and his deputies, have a great deal of latitude, but this is not the case with INS. For a taste of the detailed instructions that Congress has given, note not only the length of IRCA, but also read box 19 on page 2 of the second phase application form, (the I-698 reproduced in the appendix). This is a listing of what obstacles to immigration to the US can be waived (e.g. insanity, prior deportations) and which ones can not (e.g. likelihood of becoming a public charge, or World War II service with the Nazis).

The description of the functions of the RPFs that follows begins with more detailed discussions of the operations of the legalization offices and the data entry facility in London, Kentucky, as they impact the decision factories, and then includes accounts of RPF adjudications, RPF fraud-detection activities, RPF handling of appeals, and the impact of law suits on the RPF operations. These reports, in contrast to the client-oriented perspectives used previously, are those of outside observers looking at various steps in a mass decision-making process.

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[21] See North, *The Long Gray Welcome: A Study of the American Naturalization Program* (NALEO Education Fund), Washington, D.C., 1985. In addition to a small number of formal denials in this program there are a larger number of, in effect, staff decisions that applicants should file again later.

Legalization Office Operations. From the point of view of the RPFs, the legalization offices produce a variety of files, all demanding an RPF decision. These files, in addition to more than three million SAW and phase one 245A applications, also include small numbers of waiver applications filed by SAW or 245A applicants and even smaller numbers of applications filed by aliens granted legalization through another channel, those from a handful of nations who have Extended Voluntary Departure (EVD) status.

Let us dispose of these two small categories first. Persons seeking immigrant status generally can be rejected (i.e. be held excludable) on a number of grounds, such as recent prior deportations, or the prior use of a fraudulent document; or, if they have strong ties to the United States and have otherwise clean records, the barriers created by a pre-1982 deportation, for example, can be waived in an exercise of the Government's discretion.[22] By Nov. 14, 1988, when INS had received 67,911 legalization-related waiver requests nationwide, the agency had said yes to 37,705 of them, no to 2,322 of them, and had not yet decided on 27,884 other cases; of those cases decided, 94.2% were approvals.[23]

EVD cases involve small numbers of people from Afghanistan, Ethiopia, Poland and Uganda who can apply for TRA status through the legalization offices. Their cases are neither difficult enough to have made much impression on the RPF managers, nor numerous enough to secure a separate line on the management information system, so little can be said about them.[24]

Returning to the principal flow of paper, all feed-in 245A and SAWs applications received by the LOs must be transmitted to the decision factories. Each of these files includes:

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[22] Deportations after January 1, 1982, however, can not be waived.

[23] Unpublished INS statistical data.

[24] For more on this small group of legalization eligibles, whose status was mandated through a different legislative vehicle than IRCA, see North and Portz *Through the Maze*, pp. 6-8.

- the adjudicator's worksheet (I-696) (see Exhibit Two);
- the completed medical examination;
- a full set of fingerprints and photographs;
- an indication that the fee has been paid; and
- the application form (I-687 for 245A cases or I-700 for SAWs, see Appendix) and accompanying documentation.

In addition if a waiver is needed, that is sent along. Similarly if the adjudicator determines that more documentation is needed, he attaches to the file the request for documents (I-72) that he has given to the applicant.

The most important part of the package, from the RPF point of view, is the adjudicator's checkmarks in box B (see Exhibit Two). To make things suitably complicated box B is *not* a multiple-choice question in which one answer is called for; the adjudicator must check at least one box, but may, given the circumstances check as many as four of them.[25]

The terminology in box B, combined with the pattern of RPF operations, has probably created some needless grief for the agency. It was awkward for INS that word got to the press that as many as 50 to 70% of the final group of SAW applicants were being recommended for denial. Adjudicators in the LOs knew that cases which attracted neither hits from the electronic data systems nor recommended denials, would be likely to receive an automatic approval. The only way that they could be sure that someone looked at the case again was to recommend denial; and many of the recommended denials, we gather, fell into that category.

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[25] For example, the examiner faced with a suspicious, ill-documented case, could check the boxes for recommended denial (#2), fraud suspected, verification requested and one of five levels of suspected fraud. For a while some adjudicators in the Chicago area were simultaneously checking granted and fraud suspected, a combination which the Northern RPF found anomalous, and which was subsequently not used.

Had there been an additional box labelled: "recommended scrutiny" the problem of semantics would not have occurred.

In a few instances, Legalization Offices made denials on the spot -- in which case no temporary work authorization was granted. These, so called "statutory denials" are used when one of the situations outlined in box C and D of Form I-696 are apparent. These decisions are not made very often because they cover a fairly narrow range of circumstances -- an applicant who shows up with no documentation whatever, for example, or one who simultaneously states that he is eligible under the SAW program but never set foot on a farm.[26]. When statutory denials are made, like any recommended denial determination, the file is sent on to the RPF and the paper trail for a potential appeal is recorded.

INS placed greater emphasis on statutory denials as the program progressed. At first the LOs issued these denials only in cases where the applicants stated that they were ineligible (or did not make claims of eligibility) or in cases where they admitted fraud. By March, 1988, the regulations were revised to expand the LOs' authority to grant such denials if they found evidence of fraud.[27]

London, Kentucky Operations. No decisions are made in London, but all files are sent from the LOs to London, where two things happen: (1) basic data entries are made in the national INS computerized legalization data system, and (2) electronic inquiries regarding the applicant are made applicant to several other INS data systems, to the FBI files on criminal records, and to a couple of other filing systems. Hits on these systems are transmitted to the RPFs.

We did not have a chance to inquire from anyone who knew the answer why three million files are sent to a single computerized handling facility, and then moved on to the four RPFs, all of which are also in the business of handling INS files and computers. Why not decentralize the data entry process, and avoid the expense of moving the files twice?

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[26] Another example would be an application made on behalf of a child born outside the U.S. after Jan 1, 1982. One could not qualify as having lived in the U.S. continuously since Jan. 1, 1982 if one were born after that date but such applications have been filed, and once denied, appealed. By October 12, 1988, INS had made 24,151 of these statutory denials, according to unpublished INS statistics.

[27] See INS Legalization Wire # 59, March 15, 1988, as quoted in *Interpreter Releases* April 4, 1988, "INS Moves to Reduce Legalization Backlog"; see also "INS Revises SAW Regulations" in the same issue, pp. 336-338.

The FBI check is not as comprehensive as one might imagine. It starts with a check by name and date of birth; if there is a hit, (an indication of an encounter with law enforcement authorities) then the fingerprints are shipped to the FBI for positive identification. If the prints confirm the identification then the RPF gets the details of the case; usually these are for minor violations; in less than 1% of the cases coming to the RPF is the criminal record significant enough to warrant serious scrutiny.

Our comment about the lack of comprehensiveness of the FBI check relates to the fact that all the fingerprints are not run through the system; were that to be done, more positive identifications would presumably be made, on the grounds that once-arrested persons often use different names in subsequent encounters with the Government. But the FBI does not regard searching through three millions sets of fingerprints as a useful (or indeed a feasible) exercise.

London, Kentucky, also sends electronic queries to several other data systems, none of which are as significant as the INS Central Index and the FBI files just described. These other systems include an INS file on nonimmigrants, a specialized file on INS deportation activities, a file on foreign students, and the look-out file (National Automated Immigration Lookout System or NAILS) which is used by immigration inspectors as they talk with those seeking admission at the ports of entry.[28] No one we encountered could recall a hit on the NAILS system, which carries a list of prominent terrorists and other unattractive types.

Interestingly, while all these electronic checks are made, often will minimal results, one other data matching processes has not been used. Since INS has the alien's social security number (SSN), and since more than one million aliens filed for SAW status in California, why did not INS routinely ask the California State Employment Development Department (EDD) to provide data on applicants' agricultural earnings? EDD, which runs the unemployment insurance program in that state, has unusually good data on farm workers, and their earnings. EDD data could have been used to confirm agricultural employment, and ease the decision-making in these cases; unfortunately, the electronic checks were only used to secure negative information.

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[28] For more on NAILS, see U.S. General Accounting Office *Computer Systems: Overview of Federal Systems for Processing Aliens Seeking U.S. Entry* (GAO/IMTEC-88-55BR) Washington, D.C., 1988 pp. 18-21.

RPF Adjudications. After their detour to London, Kentucky, the files arrive at the RPFs where they are logged into the RPF computer system and marked with machine-readable bar codes. Then, they are allowed to age for a while either until reports come in from the electronic filing systems, or until it is clear that there will be no such reports. About 40% of the files draw some attention from some system, usually the existence of a prior INS file.

Should there be an A-file it is shipped to the requesting RPF. Since, however, some of these files are never found, and others are found only slowly (many having been retired to federal archives) the RPFs have put a 42-day limit on the process. If no A-file shows up after this period the application is adjudicated anyway on the basis of the legalization application and whatever electronic data exists in INS files.

Once the electronic searches are finished (or the allocated time has elapsed) the cases move on toward adjudication. Clerks determine which cases are eligible for automatic approval (i.e. no hits plus LO approval recommendation). When the program was young, and the volume was low, all cases were individually reviewed, and, in INS terms, "manually" approved or denied. Later, as volume increased, only a sample of the automatic approvals (10% in November, 1988) were reviewed by adjudicators.

The vast majority of the all legalization cases are reviewed by RPF adjudicators. For example, in the Northern Region, through Dec. 1, 1988, these were the rounded numbers of cases:

Action	Section 245A	SAWs
automatic approvals	29,000	0
manual approvals	90,000	35,800
denials	4,500	1,800[29]

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[29] Unpublished INS statistics from the Northern RPF.

As a matter of policy, all SAW applications are reviewed manually, presumably due to the high incidence in this program of suspected fraud.

Within the cases receiving manual review there are, again, categories and subcategories. The easiest are those in which approval has been recommended at the LO, which is the norm in the 245A program and is usually the case in the SAW program.

The following are for Western Region through Nov. 27, 1988:

Category	Section 245A	SAWs
Applications Accepted	1,019,697	579,831
Interviews Completed	992,307	463,193
Recommended Denial	171,347	201,096[30]

When recommended denials are compared with interviews completed (no recommendations are made until the interviews have taken place) we find that in the Western Region, in 17.3% of the Section 245A cases the LO recommended denials, while 43.4% of the SAW cases had LO denial recommendations. (Also note that 27,000 Section 245A interviews had not yet taken place in the Western Region, although the filing deadline for that program was six and a half months earlier.)

Returning to the adjudication process, most of the Section 245A cases which are manually adjudicated are those for which the LO recommended approval, and for which there is a hit on one of the electronic systems. Most of the hits are not serious, and most of this group of cases can be approved without much further processing.

The next level of difficulty are 245A cases in which the LO has recommended denial (though bear in mind the comment made on this earlier). Although detailed cross tabulations do not appear to be available, RPF managers tell us that they are over-ruling (i.e. granting) more than two-thirds of these cases. Usually if a LO recommendation is to be reversed -- in either direction -- the case is either reviewed by a supervisor or by a special unit of adjudicators.

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[30] Unpublished INS statistical data, (Western Region Statistical Report).

Of roughly the same level of difficulty are the less than 1% of the total flow of cases in which there is a serious criminal problem or a recent deportation. The adjudicator must be sure that the violation is such that no waiver is either possible, or if possible, warranted. In the Western Region such decisions are routinely sent for additional review to one of the special denial units.

Finally, there are the most difficult of cases, those in which fraud (usually SAW fraud) is suspected; treatment of this class is described in the next section.

What are the statistical outcomes of all this activity? As Exhibit Three indicates, 73% of the Section 245A cases had been settled by December 5, 1988, and the overwhelming majority were approved. On the other hand, the SAW program, with its later deadline, had only 29% of its cases decided by that date, and there was a much higher percentage of denials, particularly in the Eastern Region. (The Eastern Region includes Virginia, West Virginia and Pennsylvania, and the states north and east of them -- an essentially urban area. The denial rate is probably higher than in other regions not only because it received so many urban SAW applications, more than 14,000 in New York City, for example, but also because of the Region's aggressive program regarding document fraud.)[31]

RPFs and Fraud. Before describing what the RPFs are doing about SAW fraud, it is useful to discuss some of the statistical and anecdotal evidence that suggests the extent of the problem.

Statistically, there not only are a lot more SAW applicants than anyone expected, but their numbers in California, anyway, appear to be very large in comparison with other measures of the California farm labor force. For example, on Sept 19, 1988, we compared the total number of SAW applicants in that state (455,106) to the total number of man years used in California agriculture the previous year (273,700.)[32] If all the California SAW applicants worked fulltime in California agriculture they would provide twice as many man years of work as California used in 1987--even if *no one except SAW applicants* were employed in the roles of farmer, unpaid farm family worker, year-around farmworker and seasonal farmworker. Another comparison made at the time -- if all SAW applicants in California worked only fourteen weeks a year, they would provide more than enough weeks of seasonal farm labor to meet the State's current seasonal labor-use practices -- again, even if no citizen or green card worker picked a single head of lettuce or clipped a single lemon. Our point was that either the State of California, which keeps some of the best farm labor statistics in the nation, had grossly understated the size of the agricultural work force or there was an unbelievably large number of SAW applicants.

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[31] While there have been many references to unpublished INS data in this report, grateful mention should be made of the periodic publication of "Provisional Legalization Application Statistics" by the INS Statistical Analysis Branch, an extremely valuable reference tool. The data on New York City filings for SAW status, for example, is drawn from the October 9, 1988, issue of this report, table 8.

After we made our statistical comparisons another 235,000 applicants appeared; the pool of genuine and alleged SAWs had expanded by another 51%.

Anecdotally, much has been written about the bizarre accounts of farmwork offered by city people trying to take advantage of the program, the picking of purple cotton, the use of ladders in the strawberry harvest, the harvest of cherries by digging them from the ground. What we found impressive on trips through California was the unanimity of comments from all sides -- INS staffers and people in the immigrant-serving agencies, Anglos and Hispanics -- the agreement that fraud was rife in this program, and rare in the 245A program.

Support for this position came from an unlikely source, a staffer for one of the many local offices of ALFA (Alien Legalization for Agriculture) the grower-supported QDE which operated throughout the state. When we asked toward the end of the program: "do you ever see any fraudulent applicants" the answer was "most of the people I have seen in the last six months."

We then continued: "What is it that gives you the first hint of this?" There was a pause and then: "Well, there's the whiteout on the applications."

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[32] See North, "IRCA's Batting Averages (Memo # 2)" TransCentury Development Associates, Washington, Sept 22, 1988.

The source of the estimate of man years of agricultural employment is: California Employment Development Department, Report 881-M, Agricultural Employment Estimates, February, 1988, Sacramento.

Returning to the RPFs, and their work in this area, three preliminary points should be made:

> 1. Many farmworkers do, in fact, have great, legitimate difficulties in documenting their work history. Some migrants never learn the name of the grower, having real contact only with the crew leader who may or may not be accessible. Farmworkers are powerless in their dealings with their employers, further, many of them are illiterate.
>
> 2. The burden of proof in SAW determinations, because of these factors, has been placed largely on the INS by IRCA.
>
> 3. INS has, to some extent, tied its own hands by placing the locus of decision-making in this program in the RPFs and not in the LOs, where the face-to-face interviews occur.

The first point has been made at some length in a series of lawsuits filed against INS in Miami, El Paso and Sacramento by farmworker advocates, which are discussed briefly under "RPFs and the Courts."

The second point relates to one more of the many differences between the posture of the 245A and the SAW applicants. Typically, in the 245A and other INS programs, if an applicant files a fraudulent document, and it is identified as such, that is the end of the case. But in the SAW program it can simply be the start of the process.

INS has determined that if a farmworker can make a good preliminary case that he is eligible for the program,[33] if he files the application with a single supporting document, then he has done what he needs to do to open his case, and it is up to the Service, if it is suspicious, to refute it. In other words, at some early stage in the process the burden of proof shifts from the applicant to the Government. (There is no comparable shifting point in the 245A program.)

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[33] The IRCA term for such a claim is a "non-frivolous application;" INS has defined a non-frivolous application as one which is supported by at least one piece or documentation other than the alien's application.

not work that crop that year, INS has an obligation to tell him why they plan to deny the application on its form I-72. At this point the applicant is not blackballed for having shown a phoney document to the Government, he simply has been blocked on that attempt to prove his case; INS has not proved that the farmworker is ineligible, it has simply proved that the proof offered is not adequate.[34] The farmworker has an opportunity to change his story, and come in with a different document which might withstand INS scrutiny. (Since SAW applicants were never confined to applying at a specific Legalization Office, as most 245A applicants were, the once-rejected SAW applicant could not only apply again, he could do so at a different office, perhaps even in a different region.)

Meanwhile, although it is generally accepted that when the credibility of the applicant, or the witness, is the key question, face-to-face decision-making is appropriate. This is what juries do. But INS had created a system in which the ultimate decisions on these cases are not made under those circumstances, they are made in the distant decision factories.

It was within this difficult context that the Central Office of INS dispatched a wire to the field urging, but not demanding, that an effort be made to verify the employment of SAWs *before* their interview. The notion was that if the adjudicator knew that the claimed employer either did not exist or denied signing the affidavit, then he might be in a position to make a statutory denial. The wire, however, went out late in the program, at a time when resources were severely strained (after two to three times as many SAWs applied as expected) and from what we could learn in the field, relatively few Legalization Offices were able to follow the advice of the Central Office.[35]

The RPFs have, however, not given up the struggle. They have devised a series of techniques to expose *organized* fraud in the SAW program. They are essentially helpless against the individual or small-scale fraud which takes this form; Applicant A says (falsely) that he worked for a sufficient time for Farmer X, working in Y crop; Farmer X signs the I-705 supporting the application; when he is phoned or visited, Farmer X insists that Applicant A did work for him, and, it is determined that Farmer X did, in fact, grow crop Y in the year of interest. If Farmer X obliges in this manner only infrequently compared to the apparent size of his labor force, INS is in no position to do anything about it.

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[34] This procedure, which sets teeth on edge among INS people, was instituted following the decision in *Haitian Refugee Center v. Nelson*, cited in footnote #41.

[35] For a text of the wire, see "INS Advises on SAW Fraud" *Interpreter Releases*, September 26, 1988.

Organized fraud generally takes one of three forms· in some cases the labor contractor or grower both signs the fraudulent documents and sells them to alleged workers; in other cases the signer of the documents does not sell the documents directly, in effect, he signs blanks for so much an autograph, and a facilitator (or vendor) sells them for a substantial markup;[36] in the third form the labor contractor or the grower is innocent; someone has forged his name.

The RPFs can do something with these patterns of fraud, they can bring their computers to bear on the problem. Exhibit Four is a worksheet for use in both LOs (in this case in the Western Region) and the RPF. If a given notary's name starts showing up quite frequently among the SAW applications, all the forms he signed can be reviewed to see if there is fraud. If a given affiant (a labor contractor or a grower) seems to have a lot of ex-workers applying, the number of such workers, and their nationality can be ascertained. Similarly if one is interested in the pattern of Albanian illegals claiming SAW status in Las Vegas (real story) then the affiants, notaries and the names of the farms they claimed can be identified.

Similarly, both the Western and Northern regions have created files on legitimate growers and crew leaders. The Western Region has a thick collection of 270 3-or-4-page descriptions of these farms, what they grow, and when they grew it, how many acres they had, who is empowered to sign documents. Sometimes there are copies of valid, and sometimes of both valid and forged signatures. In many instances growers, finding that someone had forged their names to phoney documents, brought the subject to the attention of INS, and volunteered the information about their real farm activities. But what does a sophisticated system do when a real farmworker has a real document signed by a real labor contractor, who has also sold his signature a hundred times? As noted earlier, INS asks for other documentation, and yet another SAW file goes into the pending category.

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[36] This modus operandi sometimes involves two ethnic groups, which sometimes suggests unusual (and suspicious patterns). In one of the first fraud cases prosecuted in the courts, the signers of the documents were several Hispanic crew leaders, while the alleged workers were all East Indians with urban addresses. Once the pattern was identified it raised questions -- why would that group of workers work for those crew leaders? See U.S. Attorney, Eastern District of California Press Release "Amnesty Fraud Prosecution," Office of the U.S. Attorney, Fresno, California, 1/14/88, or *Through the Maze*, pp. 67-68.

RPFs and the Appeals Process. A legalization applicant who receives a formal denial may appeal that decision. The applicant has a period of 33 days to do so; appeals are filed (along with a $50 fee) at the RPF. If the applicant, or his or her attorney, wants an additional 30 days to perfect the appeal, the applicant may apply in writing for the additional time. Further, the applicant may file additional documentation with the appeal.

A newly-arrived appeal is first examined by the RPF. Has the appellant corrected the problem which led to the denial in the first place? Is there new evidence which is convincing? Has the constantly changing legal and regulatory framework been altered since the original decision was made so that the appellant is now eligible? The answer to one or more of these questions is often positive, and in those cases the RPF short-circuits the appeals process by granting TRA status.

This reopening and reconsideration at the RPF is, in a sense, an additional appeals system, one that is not mandated by IRCA. There have been no complaints about this extra layer of activity, however, because the only possible result (from the point of view of the applicant) is another, earlier opportunity to secure the benefit. If, after this additional review, the RPF is sure of its ground, it sends the case to the Legalization Appeals Unit (LAU) in Washington, D.C.

That entity also works with the written record, and nothing else. It, too, is a decision factory, and its findings, as noted earlier, can only be appealed if the rejected applicant finds himself in deportation proceedings.

As mentioned earlier, the overwhelming majority of RPF decisions are in favor of the applicant. What happens to the cases that go into the appeals process? Let's look at the flow in the Northern Region.

A little less than half the denials are appealed nationally, but the percentage ranges from region to region. It is below 25% in the Western Region, but in the Northern Region, where statistics on this point were readily available, there had been 4,795 denials and 2,605 appeals (in the 245A and SAW programs combined.) The actual proportion of appeals to denials will ultimately be slightly higher than these numbers would suggest since the number of denials include a few that are less than 33 days old, from which at least some additional appeals can be expected.

The disposition of the appeals filed with the Northern RPF as of 12/9/88 is as follows:

2,605	appeals feed in
236	grants upon reconsideration at RPF
2,369	transmission to LAU

Of the Northern RPF's cases decided by the LAU, only 7%, or 161 out of 2369, have been reversed (i.e. RPF denials have been changed to grants by LAU.)

In summary, a substantial portion of appeals are reversed by the RPF on reopening, but once they are sent on to the LAU, and they are decided by the LAU, they are highly likely to be sustained. On the other hand, the decision made most frequently by the LAU, the remanding of cases to the RPF, often leads the RPF to reverse itself. (The manner in which work load data are collected by INS on this point makes it difficult to determine what is really happening in this process.) National caseload and decision-making data for appeals disposed by the LAU are as follows.

Activity	SAW	Section 245A
Deny benefit	467	1,061
Grant benefit	8	70
Remand to RPF	5,644	538
Withdrawn by applicant	26	5
Total dispositions	6,145	1,674[37]

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[37] Data are unpublished INS workload data provided by telephone in December, 1988, by the Legalization Appeals Unit.

The numerous remands relate, primarily, to suits against INS program regulations, or alleged failure on the part of INS to carry out its own regulations. Probably a majority, perhaps a big majority of these remands will lead to the granting of benefits, but as to decisions made to date note the remarkably small number of RPF reversals in the SAW program (eight, nationwide). For a breakout of some of these data by region, see Exhibit Five.

There is another, small flow of cases from the RPFs to the LAU. These are instances in which the RPFs are puzzled, usually over legal issues, and certify the case to the LAU on their own motion. Sometimes the RPF makes a recommendation as to denial or award in these cases. In all of them, the applicant is informed that the case is being handled in this way, and is given an opportunity to file new documentation with the LAU. No fee is assessed in these cases. There had been 123 of these cases nationwide by early December, 1988.

In both the disability pension and legalization systems only the applicant appeals; the Government does not appeal grants made in the decision factories but it does, of course, set the rules of decision-making in those places, a process which is conducted under the watchful eyes of the courts, our next subject.

RPFs and the Courts. Although the decision factories have made thousands of decisions adverse to applicants, few of these have made their way into the courts. Courts, however, play an important role in the operations of the RPFs and of the legalization program generally.

This seemingly contradictory situation is the case because lawyers for immigrants' rights groups have concentrated their energies in early stages of the legalization process, filing class action and habeas corpus suits against INS regulations, rather than waiting to appeal specific adverse decisions coming out of the LAU.

There has been much legal activity in this field, with the American Immigration Lawyers Association tallying 32 separate and distinct suits as of Nov. 7, 1988.[38] (The list has since been lengthened.) All of the suits, with one exception, have been aimed at making the regulations more generous, and enough of them have been successful to open wider a number of doors for legalization applicants.

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[38] See the Nov. 15, 1988 memorandum from Crystal Williams, Director of AILA's Legalization Appeals Project "New developments in legalization and SAW litigation".

While the complexity of this skein of suits is such to warrant a paper much longer and more learned than this one, we can only mention some of the more important facets of this body of litigation on the legalization process.

In the first place, it appears to the non-lawyerly authors of this paper, that the immigration bar, while totally decentralized, is almost as well coordinated in bringing these suits as the Government is in defending against them. The immigrant advocates seem to be in steady contact with each other on a one-to-one basis as well as working together through AILA and other networks.

Secondly, these suits have attacked a wide range of apparently vulnerable Government positions. For example, one group of cases (in which INS played only a minor role) involved the question of which crops should be listed among the perishable ones leading to SAW status. The Department of Agriculture, in response to various interests, concocted a long list of perishable crops -- including such unlikely entries as Christmas trees and clarinet reeds. When the cotton growers and workers sued the Department, it was hard pressed to support the exclusion of cotton. There have also been suits on the inclusion of sod farms and the cutting of sugar cane.[39] The one suit designed to narrow the scope of legalization in this category -- the effort of the Federation of Americans for Immigration Reform (FAIR) to cause the Department of Agriculture to shorten the list of SAW crops -- was unsuccessful.[40]

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[39] "USDA Applies Linguistic Veg-O-Matic to Would-be SAW Sugar Cane Workers," *Interpreter Releases*, Vol. 65, No. 32, 8/22/88, pp 841-2.

[40] *Northwest Forest Workers v. Lyng*. No. 87-1487 (D.D.C. 1988.) Two other crop-related suits were unsuccessful at this writing, one was filed on behalf of hay workers and the other on behalf of sugar cane cutters; the courts ruled that such workers were not eligible for the SAW program. The sugar cane case was a particularly interesting one in that the Florida growers of cane were opposed to granting of SAW status to the Jamaicans who had worked for them as nonimmigrant (H-2) workers. The growers' apparent reasoning was that if the workers were allowed into the SAW program they would be unlikely to continue the grim work of cutting cane with machetes, because then they would be free to take other work in the United States, a freedom that they lack in H-2 status.

Thirdly, and most importantly, most of the cases were class actions attacking INS regulations on subjects where reasonable people could disagree. These dealt with such matters as the length of time an applicant could be out of the nation without breaking his or her continuous illegal residence, the appropriate definition of a potential public charge, and whether or not an alien "known to the Government" to be in illegal status had to be known to INS (as that agency argued) or, as the advocates successfully argued, such status could be known by another agency or by a combination of government agencies.

Three cases of particular significance deserve specific mention because of their somewhat different impact on RPF activities. These are the *Ayuda*, *UFWA* and *Haitian Refugee Center* cases.[41]

The judge in the *Ayuda* case (Judge Stanley Sporkin) issued a number of orders and ultimately appointed a Special Master to rule on individual "known to the Government" cases filed under his order.[42] It is estimated by AILA that as many as 5,000 post-May 4, 1988 cases will be handled under this court order -- and outside the jurisdiction of the RPFs; similarly there is also a block of more than 6,000 cases once denied on known-to-government grounds which were re-opened as a result of Judge Sporkin's order.

Many of the *Ayuda* beneficiaries are former students who entered the nation legally as nonimmigrants, and who then proceeded to work in violation of their visas, an act not known to INS, but known to the Internal Revenue Service and the Social Security Administration (which collected taxes from them). Most of the *Ayuda* beneficiaries are now in middle class status, and most are from nations other than Mexico.

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[41] These are respectively the "known to the Government" case mentioned above, *Ayuda, Inc. v. Meese*, 687 F. Supp. 650 (D.D.C. 1988), a case involving the extent of documentation needed by SAW applicants, *United Farm Workers of America v. INS*, C. No. S-87-1064-LKK/JFM (E.D. Cal.), and *Haitian Refugee Center v. Nelson*, No. 88-1066 (S.D. Fla 1988) challenging a number of INS practices and policies regarding the SAW program.

[42] See "*Ayuda* Court Provides for Special Master, Extends Filing Date to October 30" *Interpreter Releases*, October 3, 1988, pp. 1012-1014. Other *IR* reports on this case are listed here as well.

UFWA beneficiaries, on the other hand, are farmworkers, largely Mexican Nationals. This case (along with two other almost parallel cases)[43] are making a major impact in the way the RPFs handle SAW cases. The UFWA attorneys contended that an alien's own statement should be sufficient to shift the afore-mentioned burden of proof to the Government. Picking up *Interpreter Release's* account of the case:

> Judge [Lawrence K.] Karlton disagreed, holding that 'Congress explicitly intended to require SAW applicants to submit some corroborating documentation to sustain. . .a nonfrivolous application.'
>
> While plaintiffs lost the preliminary injunction they may have won a partial victory. Judge Karlton's definition of what constitutes 'corroborating documentation' is quite liberal (emphasis in original):
>
> 'The applicant need only produce corroborating documentation that he or she performed some portion of the claimed qualifying work; once this is established his or her own testimony, if credible, as to the extent of that employment will suffice to shift the burden of proof to INS. For example, the corroborating affidavit of a co-worker that the applicant worked for a particular farmer at some point during the claimed period will establish the *fact* of employment; the applicant's own testimony that he or she worked for that farmer for the full 90 man-days establishes the *extent* of employment.'

This ruling, if it is not overturned on appeal, will change the ways that the RFPs do their business. The RPFs have been unhappy with affidavits filed by co-workers, on the grounds that two alleged co-workers could be trading these pieces of documentation to support each other's legalization applications. They have also sought documentation that covered the full 90 days of required work.

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[43] See *Haitian Refugee Center v. Nelson* and *Ramirez-Fernandez v. Guigni*, No. EP-88-CA-389 (N.D.Tex. 1988) which are described in the AILA memorandum cited in Footnote No. 38.

When a similar battle over what constitutes appropriate documentation for farmworkers was joined in Florida, between lawyers for Haitians and INS,[44] it led to a court order mandating the re-opening of once-denied cases; as a result, a large block of SAW cases were remanded from the LAU to the RPFs. The district court in this matter ordered several safeguards for SAW applicants including the provision of competent translators and full transcription of SAW legalization interviews, but this part of the order was stayed in the Court of Appeals.

In short, the RPFs, like many other agencies with similar assignments, must not only pay attention to what the appeals system does to their individual decisions, but what the courts are doing to the ground rules under which they must operate. In the legalization program, the latter is a much more important force than the former.

Standards used in Decision-Making. What standards are used by the LOs, the RPFs and the LAU when they make decisions on individual applications? A detailed answer to that question would fill a 200-page report, but perhaps some brief comments will be helpful.

As noted frequently, the legalization program, like INS generally, makes decisions with minimal input from attorneys.[45]

It has been suggested by some critics of INS that this lack of lawyers may relate to the frequency (and the success) with which the agency has been sued.

Decisions at the LO, RPF and LAU level are made based on a fairly slim volume of paper -- the statute, the regulations, legalization wires (from the Central Office), the policy memoranda which follow the wires, decisions of the courts, six precedent decisions of the LAU, and 20 volumes of Board of Immigration Appeals (BIA) decisions (a body of law which has been accumulating since 1906).

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[44] See *Haitian Refugee Center v. Nelson* (op cit). In addition to reports in *Interpreter Releases* on these cases, see "Litigation" in *Legalization Update* (published by the National Center for Immigrants' Rights), especially Vol. 2, Issue 9, October 31, 1988 and Vol. 2, Issue 8, August 30, 1988.

[45] The continuing naturalization program of INS is roughly comparable to the short-lived legalization program, in that a legal benefits are provided to individuals who meet certain requirements; first-line decision-makers in the naturalization program formerly were lawyers, but a few years ago the Justice Department decided that this was a misuse of legal training, and the lawyers were replaced by lay adjudicators.

One commentator, Ms. Crystal Williams, director of AILA's legalization project, says she has collected every relevant INS-produced document needed for decision-making (excluding the BIA decisions) and it fills only one file drawer.

This is in contrast with the much older, and presumably more complex, Social Security program, which operates with a massive, Policy Operations Manual, whose index, alone, is said to require four volumes.

In the Northern RFP the collection of material described above is placed in a central location, a staff reading room. As new materials (court decisions, regulations and policy memoranda) become available in that region they are summarized in internal memoranda and distributed to the adjudicators.

The INS central office, early in the program, sought to meet the need for a comprehensive reference work on legalization by creating a one-volume Legalization Handbook. The program changed so rapidly that it became impossible to keep the Handbook up to date, and it was abandoned for all practical purposes.

How is this modest volume of guidance material used, in fact, in the three levels of the decision-making process in the SAW program? Let us look at some of the standards used at the LO level. The first part of the decision-making process, made during the face-to-face interview, includes the imposition of these three initial standards:

> 1. Is the applicant actually claiming eligibility? Does he claim that he worked in an appropriate crop for the right length of time? If not, the application is denied.
>
> 2. Is the application package complete?. Are all the forms included? Is the medical document signed? Is there the right kind of check, in the right amount? (INS did not accept personal checks, only money orders and cashier's checks.) If these standards were not met, usually the applicant was given an opportunity to rectify the situation.

> 3. Does the documentation relate to the applicant? A number of illiterate Haitian applicants in South Florida, including many eligible for the program, got into trouble because they had purchased Haitian birth certificates from inept middlemen who did not bother to make sure that the phoney documents bore the correct names.

Once these entry-level standards have been met, the interviewer works through a series of other standards, including the following:

- Is there no independent documentation of his claim? Is the documentation, on its face, unbelievable? In either case a denial can be expected.

- Is the applicant engaging in known fraud? Is he, for example, offering an employment verification document provided by an individual known to have not been engaged in agriculture. This would lead to a denial, at least of that document.

- Is the applicant's explanation of the kind of work done believable? Does he seem to know how lemons are clipped or blueberries rolled (if these are the crops claimed)? An implausible answer usually leads to a recommended denial.

> (All too often, particularly in urban LOs, the INS staff did not have the needed training to ask these questions.)

On a softer, fuzzier basis is the question of what INS calls the "whole man approach." Does the person look like what he claims to be? Is he dressed for that role? Are his hands right? Does the vehicle he drove to the LO fit his claim? (Thick gold chains around the neck of the applicant with soft hands who arrives in a Jaguar at the LO where he claims to be a farmworker sets the adjudicator thinking.) If the total picture of the applicant clashes with his claim, as in this instance, a denial may be recommended.

Claims are more likely to be carefully scrutinized if there is a discrepancy between the applicant's background or the location of the filing, on one hand, and the claim to be a farmworker on the other. If the applicant has a Ph.D. in chemical engineering and claims that he spent exactly 90 days working in the peanut harvest in South Georgia (real story) after he received the Ph.D., the LO will be dubious. Similarly, claims by ex-farmworkers are more likely to be reviewed carefully in Manhattan than they are in Fresno; and claims filed by people from nations not thought to provide many farmworkers to the U.S. (such as Pakistan) are likely to be looked at more carefully than those filled by Mexican Nationals.

If, on the other hand, if the applicant looks like a current or former farmworker, is from a plausible nation, and carries a verification form filled out by a grower or a labor contractor known to be in the business, and if the applicant seems to know something about the crop or crops he claims to have worked, the chances are excellent that an approval will be recommended.

The decision-making process at the RFP is different from that at the LO; again using the still continuing SAW program for our examples, the following tests or standards are among those applied:

- Is there a recommended denial from the LO? If fraud is suspected, at what level of seriousness? Recommended denials in the SAW program are screened more carefully than recommended approvals. In the 245A program only a small percentage, a sample, of the recommended approvals were screened unless there were electronic hits.

- Does the case fit into one of the patterns of abuse recorded on the RPF computers? Each RFP maintains data on such patterns, by grower, by labor contractor, by notary, by (we think) nationality, by crop and by location.

If the case fits one of these patterns, then it will be examined more carefully, and perhaps additional documentation requested.

- What, if anything, significant has shown up in the electronic checks on the individual? Does the old INS file have something that might effect eligibility for the benefit?

- Is there a need for a waiver in the file, and if there is such a need, is it there?

- Has there been a change in INS policy regarding the type of case in question, or a court-induced change in the standards, which should cause a change in the outcome of the case?

- Does the applicationl, generally "feel right" to the adjudicator; if it does, it is highly likely to be approved quickly, and if not, there may be more careful consideration. (We never saw this standard in writing, but heard it discussed frequently.)

- And, perhaps most importantly, if there is a recommended denial (and nothing else in the file pointing in that direction), has the adjudicator written an adequate justification of the denial? We understand from INS staff that more denials are reversed for lack of adequate written justification than for any other reason. If the justification is missing, then the RPF rules that it is not a "sustainable denial." In some of the larger RPFs, such as the Western one, all denials are scrutinized by a special unit that seeks to make sure that its denials are, in fact, sustainable.

For those few cases that reach the LAU the principal standards are these:

- Did the RPF appropriately interpret IRCA, regulation, policy memoranda and immigration law precedents?

- Was the case denied because of a situation which could have been remedied by a waiver?

- Has the state of the case law changed between the time the RPF last saw the case and its arrival at the LAU?

- Did the file contain an adequate written justification of the denial?

Even at the LAU level, the operation is largely free of lawyerly inputs. Although the Director of the LAU is an attorney, and though a member of the General Counsel's staff has been assigned to work with the LAU, most decisions are made by lay adjudicators, and no more than a fraction, perhaps only one case in ten, was prepared by an attorney.[46]

A review of the LAU's six precedent cases, cases, a modest body of published work for a program that had been in operation for 18 months at this writing, shows that there are several instances in which the LAU simply applied a court ruling to a case before it. The LAU's Interim Decision 3080 *Matter of N-*, decided on September 26, 1988, for example, appears to be an LAU ruling made in the wake of the *Ayuda* decision. The six LAU precedents, admittedly a tiny sample of its work, included five decisions favoring the applicant, and one against the applicant.

LAU precedent decisions are written by that agency, but the determination of which of its decisions are precedents, and thus binding on INS officers, is made by the Commissioner.

III. AN ASSESSMENT OF THE REGIONAL PROCESSING FACILITIES

"Is it possible" Mashaw asks, "to integrate the normative concerns of administrative law with the positive concerns of organizational theory?"[47]

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[46] Statement made at an Urban Institute meeting on the legalization program by Francesco Isgro, the attorney assigned to the LAU, Washington, D.C., March 3, 1989.

[47] Mashaw, *op cit*, p. ix.

One might ask, in this particular setting, is it possible to bring substantive justice, swiftly and efficiently, to three million applicants, most -- but not all -- of whom are eligible for the benefit in question? And can all this be done within Congressionally-mandated policy frameworks which, at best, are vague? Finally, do the Regional Processing Facilities play an appropriate role in such an effort to create bureaucratic justice?

Before returning to these large-scale questions, let us examine some of the advantages and disadvantages of the RPFs.

The following seem to be on the plus side:

1. There is greater, perhaps much greater, consistency in decision-making in the RPF system than in the district-by-district system used by INS in most other programs. Compare the relative similarity of the RPF treatments of SAW and 245A applications in Exhibit Three with the more traditional distribution of decisions in the naturalization program in 1984 shown in Exhibit Six. Although the Eastern Region's treatment of SAW applications was different from that of other regions, the patterns appear generally to be more consistent than in the past.

There are several reasons for this; first, there are four bosses, not 35 of them; secondly, the four RPF managers are a small enough group so that they can confer regularly, as they often do, in conference calls; thirdly, the gathering of the adjudicators, physically, in four buildings, means that program managers have a better opportunity to encourage uniform treatment of uniform inputs -- such as data in the old INS files, FBI data, and, of course the basic application. It also means that Central Office staff managers have a much smaller number of actors to relate to, and to coordinate, than in district programs.

2. The RPF system, it can be argued, tends to produce better quality decisions. The decision made by the LO adjudicator, on the spot, during the interview with the applicant may be biased and there is often no immediate second opinion. (The adjudicator may recognize a friend of a friend, or an attractive young woman, and give the applicant an undeserved break; or he can turn down a marginal case for similar human but not appropriate reasons.)

In the RPF system, however, the initial adjudicator is an important part of the process but not the totality of it. This is by design the systematic second opinion (except in the automatic approval cases). As an AILA spokesperson suggested to us, the case records in legalization cases are usually better records than in other INS cases because the person in the Legalization Office knows that his or her work will be examined by someone in the RPF.

3. The RPF system appears to be an efficient and cost-effective one. The flow of paper and electronic data appears to be better organized that in many district offices, which should lead to program gains (fewer lost files -- a perpetual INS problem) as well financial savings over the long run.

This should be the case because the RPFs are new institutions, designed to do exactly what they are doing, and created from scratch. There were new leaders, new systems, and new structures, and apparently enough money to buy what was needed. The RPFs benefit from the economies of scale, not only in financial terms but in being capable of using broader and more sophisticated public administration techniques, such as in fraud-detection.

Finally, although some would regard this as a mixed blessing, because the RPFs are completely new facilities, they will probably help INS adjust from making decisions based on a paper file to making decisions on the electronic file. (Presumably, if the decision goes against the applicant, the paper file can always be consulted.)

On the other hand:

1. In a program where fraud is a major problem, the RPF system takes away the final decision-making power, and responsibility, from the government employee best able to make that decision -- the first-line adjudicator who talks to the applicant.

2. There is no question that the RPFs are isolated, probably more so than they should be.

3. We continue to wonder why this particular version of a regionally-centralized system continues to risk loss of time, money and (more important) files, by shipping them from the Legalization Office to London, Kentucky, and then back to the RPF.

The advantages, however, clearly outweigh the disadvantages, and the significance of the disadvantages can be diminished by one set of fairly modest system designs, and by one major (if belated investment.)

The problems of isolation could be lessened by opening telephone lines (at least for immigrant-serving agencies and attorneys) in all of the RPFs, as some have done. In retrospect, it might have been useful to assign RPF interviewers to work for a few weeks in the gritty reality of the Legalization Offices.

The principal problem of too little authority for the first-line adjudicator in the SAW program relates, in part, to too little money available to fund that program. We do not have all the numbers but suspect that the amount of money brought in by the SAW applicants, something like $200,000,000, was far larger than the money spent on this program. (SAWs applications were handled with appropriated funds, not, as was the case with 245As, by a fee-funded program, though fees were collected in both instances.) Had enough money been spent on the first-stage of the SAW application-screening process, the inherent difficulty of making the final decision off-stage would have been eased considerably.

Other specific (hind sight) recommendations would include the following:

1. More training of both LO and RPF adjudicators in the specifics of the work practices in SAW-related crops; except in some rural areas, most adjudicators were suburban and city people unknowing about the specifics of farm work, and hence could not detect fraudulent claims of agricultural employment.

2. Better informational materials to help LO staff detect SAW fraud; one LO adjudicator, for example, made up a loose-leaf book filled with dried leaves. If an applicant claimed he had worked in carrots, she would ask the alien to identify the carrot leaf from her collection. INS did not build such practices into the decision-making system.

3. SAW applicants should have been given an opportunity, as they were, to file anywhere in the country. But once they filed an application they should have been restricted in dealing with the same office, and the same adjudicator, if they needed to provide further

documentation. Instead they were allowed to shop around to other LOs, even in other regions.

4. INS should have sought direct electronic assess to California's farm employment (EDD) files, to provide instant verification for SAW applicants with recorded earnings.

5. RPF staffs should have had easier access to legal advice.

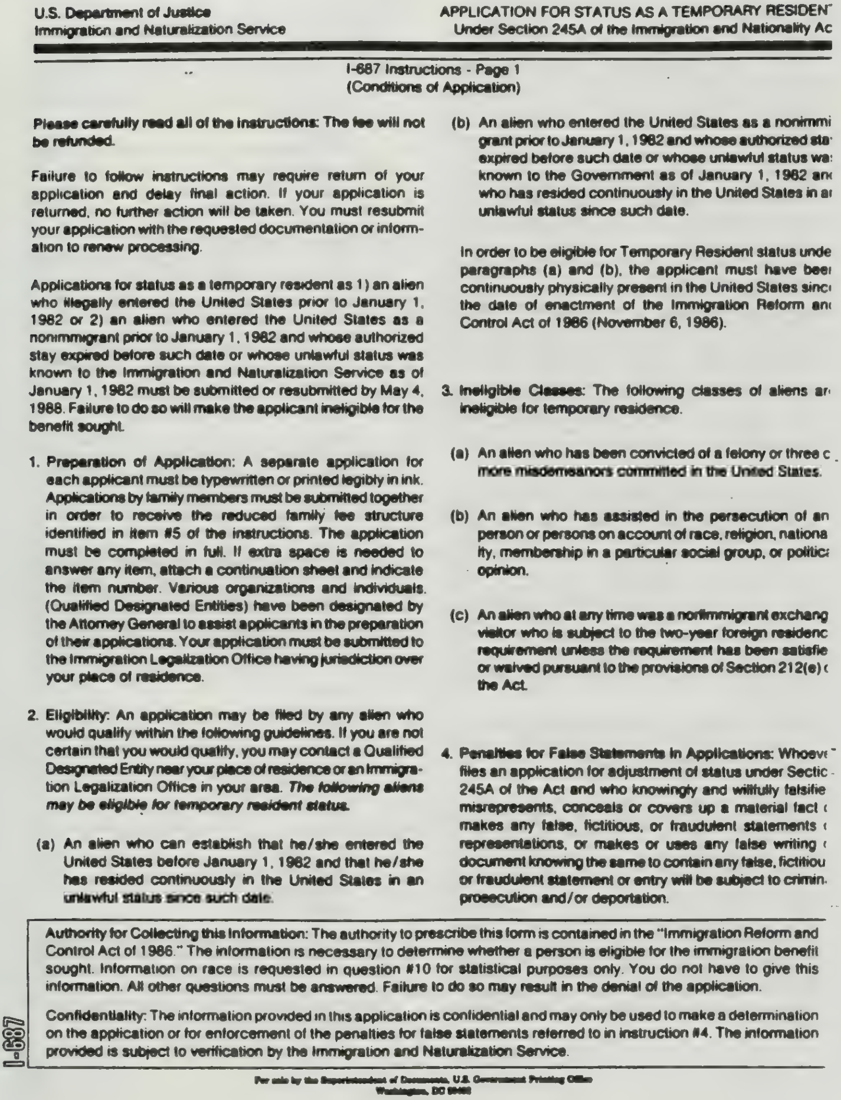
6. LO adjudicators should have been allowed an additional category "additional scrutiny" on their legalization case work sheets, so that they did not have to recommend a denial in all cases where they felt more information would be useful.

The Regional Processing Facilities, whether we like them or not, are probably the wave of the future, not only in the Immigration Service, but in other mass decision-making processes as well. If there were several more dollops of the human touch, just a little more contact with the outside world, that prospect would be an acceptable one.

Appendices

Appendix A	The Section 245A Application Form [I-687]
Appendix B	The SAW Application Form [I-700]
Appendix C	The SAW Verification Form [I-705]
Appendix D	Application for Waiver of Grounds of Excludability [I-690]
Appendix E	The Second Phase Application (for Permanent Residence Status) [I-698]

Appendix A



U.S. Department of Justice
Immigration and Naturalization Service

APPLICATION FOR STATUS AS A TEMPORARY RESIDEN
Under Section 245A of the Immigration and Nationality Ac

I-687 Instructions - Page 1
(Conditions of Application)

Please carefully read all of the instructions: The fee will not be refunded.

Failure to follow instructions may require return of your application and delay final action. If your application is returned, no further action will be taken. You must resubmit your application with the requested documentation or information to renew processing.

Applications for status as a temporary resident as 1) an alien who illegally entered the United States prior to January 1, 1982 or 2) an alien who entered the United States as a nonimmigrant prior to January 1, 1982 and whose authorized stay expired before such date or whose unlawful status was known to the Immigration and Naturalization Service as of January 1, 1982 must be submitted or resubmitted by May 4, 1988. Failure to do so will make the applicant ineligible for the benefit sought.

1. **Preparation of Application:** A separate application for each applicant must be typewritten or printed legibly in ink. Applications by family members must be submitted together in order to receive the reduced family fee structure identified in item #5 of the instructions. The application must be completed in full. If extra space is needed to answer any item, attach a continuation sheet and indicate the item number. Various organizations and individuals. (Qualified Designated Entities) have been designated by the Attorney General to assist applicants in the preparation of their applications. Your application must be submitted to the Immigration Legalization Office having jurisdiction over your place of residence.

2. **Eligibility:** An application may be filed by any alien who would qualify within the following guidelines. If you are not certain that you would qualify, you may contact a Qualified Designated Entity near your place of residence or an Immigration Legalization Office in your area. *The following aliens may be eligible for temporary resident status.*

(a) An alien who can establish that he/she entered the United States before January 1, 1982 and that he/she has resided continuously in the United States in an unlawful status since such date.

(b) An alien who entered the United States as a nonimmigrant prior to January 1, 1982 and whose authorized sta expired before such date or whose unlawful status wa known to the Government as of January 1, 1982 an who has resided continuously in the United States in a unlawful status since such date.

In order to be eligible for Temporary Resident status unde paragraphs (a) and (b), the applicant must have bee continuously physically present in the United States sinc the date of enactment of the Immigration Reform an Control Act of 1986 (November 6, 1986).

3. **Ineligible Classes:** The following classes of aliens ar ineligible for temporary residence.

(a) An alien who has been convicted of a felony or three c more misdemeanors committed in the United States.

(b) An alien who has assisted in the persecution of an person or persons on account of race, religion, nationality, membership in a particular social group, or politic opinion.

(c) An alien who at any time was a nonimmigrant exchang visitor who is subject to the two-year foreign residenc requirement unless the requirement has been satisfie or waived pursuant to the provisions of Section 212(e) the Act.

4. **Penalties for False Statements in Applications:** Whoev files an application for adjustment of status under Sectio 245A of the Act and who knowingly and willfully falsifie misrepresents, conceals or covers up a material fact makes any false, fictitious, or fraudulent statements representations, or makes or uses any false writing document knowing the same to contain any false, fictitiou or fraudulent statement or entry will be subject to crimin prosecution and/or deportation.

Authority for Collecting this Information: The authority to prescribe this form is contained in the "Immigration Reform and Control Act of 1986." The information is necessary to determine whether a person is eligible for the immigration benefit sought. Information on race is requested in question #10 for statistical purposes only. You do not have to give this information. All other questions must be answered. Failure to do so may result in the denial of the application.

Confidentiality: The information provided in this application is confidential and may only be used to make a determination on the application or for enforcement of the penalties for false statements referred to in instruction #4. The information provided is subject to verification by the Immigration and Naturalization Service.

I-687

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Washington, DC 20402

I-687 Instructions - Page 2

5. **Fees:** A fee of one hundred eighty-five dollars ($185.00) for each application, or fifty dollars ($50.00) for each application for a minor child (under 18 years of age) is required at the time of filing with the Immigration and Naturalization Service. The maximum amount payable by a family (husband, wife, and any minor children) shall be four hundred twenty dollars ($420.00). The fee is not refundable regardless of the action taken on the application. A separate cashier's check or money order must be submitted for each application. *All fees must be submitted in the exact amount.* No cash or personel checks will be accepted. The cashier's check or money order must be made payable to "Immigration and Naturalization Service" unless applicant resides in the Virgin Islands or Guam. (Applicants residing in the Virgin Islands make cashier's checks or money orders payable to "Commissioner of Finance of the Virgin Islands". Applicants residing in Guam make cashier's check or money order payable to "Treasurer, Guam".)

6. **Photographs:** Submit two (2) color photographs of yourself taken within thirty (30) days of the date of this application. These photos must have a white background, be glossy, unretouched, and not mounted; dimension of facial image should be about one inch from chin to top of hair; you should be shown in 3/4 frontal view showing right side of face with right ear visible; using pencil or felt pen, lightly print your name on the back of each photograph. Failure to comply with the above instructions will result in the return of the application without further action.

7. **Fingerprints:** A completed fingerprint card (Form FD-258) must be submitted by each applicant 14 years of age or older. Fingerprint cards with instructions for their completion are available at Qualified Designated Entity offices. Applicants may be fingerprinted by law enforcement offices, Outreach Centers, charitable and voluntary agencies, or other reputable persons or organizations. The fingerprint card (FD-258) on which the prints are submitted, the ink used, and the quality and classifiability of the prints must meet standards prescribed by the Federal Bureau of Investigaton. The card must be signed by you in the presence of the person taking your fingerprints, who must then sign his/her name and enter the date in the spaces provided. It is important to furnish all the information called for on the card.

8. **Interview:** You will be required to be present for a personal interview by an officer of the Immigration and Naturalization Service. In most locations, interviews will be scheduled subsequent to receipt of the application.

9. **Documents - General:** All documents must be submitted in the original. If the return of original documents is desired, each must be accompanied by copies certified as true and correct by your representative or Qualified Designated Entity in the format prescribed in 8 CFR 204.2 (j)(1) or (2). Certified copies unaccompanied by original documents are unacceptable. All original documents submitted without certified copies become the property of the Attorney General and will be retained by the Service. Any document in a foreign language must be accompanied by a summary translation into English. A summary translation is a condensation or abstract of the document's text but includes all pertinent facts. The translator must certify that he/she is competent to translate into English and that the translation is accurate.

10. **Documents to Establish Identity:** The following list give examples of the types of documents the Immigration an Naturalization Service will consider as evidence to establis your identity. This list is not all inclusive and other evidenc may be considered if none of the following is available:

    - Birth Certificate, Baptismal Certificate, or other ev dence of birth
    - Passport
    - National Identification Card from country of origin
    - Driver's License
    - School Identification Card
    - State Identification Card

11. **Documents to Establish Admissibility:**

    (a) Medical Report of Examination (Form I-693).

    (b) Evidence of Income: examples of documents whic may be used as evidence of financial support (income include:

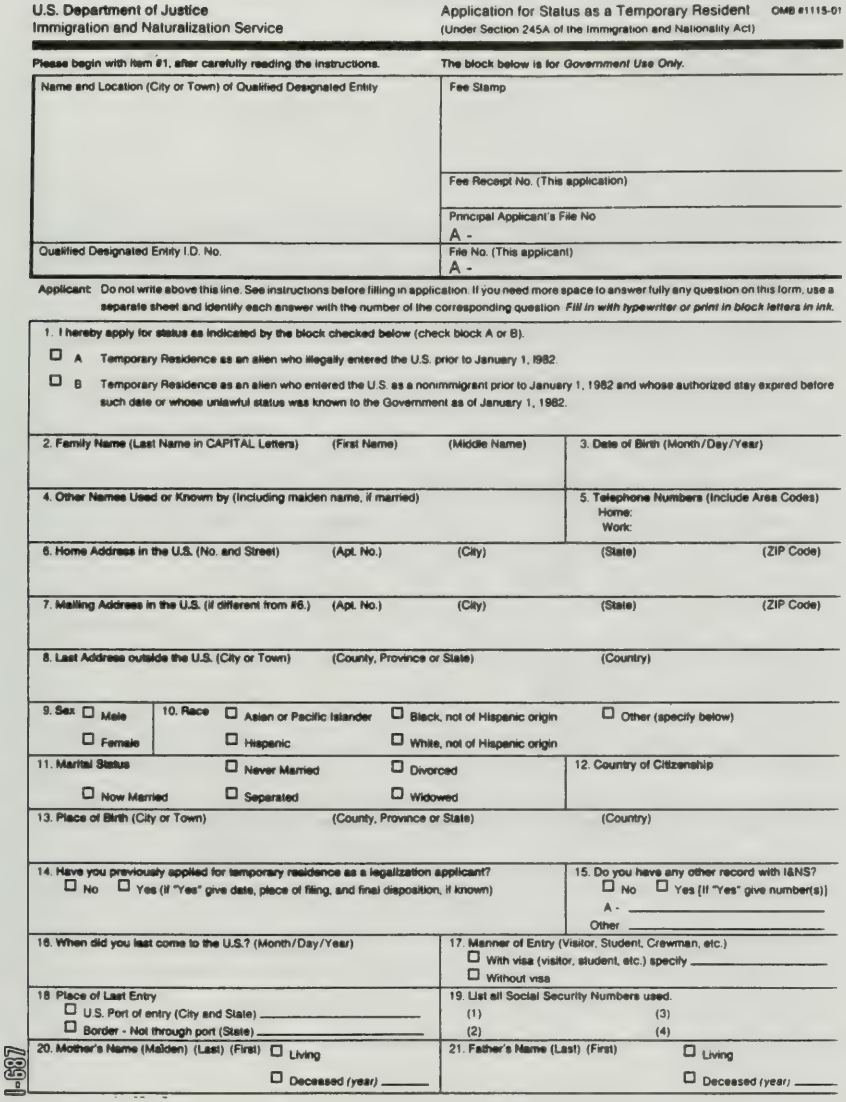
    - Letters from employers which illustrate full-tim employment.
    - W-2 Tax Records or other wage records.
    - Bank statements or evidence of other assets.
    - Form I-134 (Affidavit of Support) completed by responsible person in the United States.
    - Any other evidence to establish that the applicant not likely to become a public charge.

    (c) An application for a Waiver of Grounds of Excludabili (Form I-690) may be required if you answer any of th items 39 through 43 in the affirmative.

12. **Documents to Establish Residence:** Examples of documen which may be submitted to prove continuity of residenc include:

    - Leases
    - Rent Receipts
    - Employer, union or other business records
    - Birth certificates of children born in the United Stat
    - Automobile license receipts
    - Vehicle registrations
    - Deeds
    - Mortages
    - Utility bill receipts
    - Installment loan records
    - Church records
    - Medical records

    Letters from landlords should include the landlord's prese address and the beginning and terminating dates of t applicant's residence. Letters from employers' organiz tions or churches should be on official stationery a include relevant dates, the organization seal (if any) a the signer's name and title.



U.S. Department of Justice
Immigration and Naturalization Service

Application for Status as a Temporary Resident OMB #1115-01
(Under Section 245A of the Immigration and Nationality Act)

Please begin with item #1, after carefully reading the instructions.

The block below is for *Government Use Only.*

Name and Location (City or Town) of Qualified Designated Entity	Fee Stamp
	Fee Receipt No. (This application)
	Principal Applicant's File No A -
Qualified Designated Entity I.D. No.	File No. (This applicant) A -

Applicant: Do not write above this line. See instructions before filling in application. If you need more space to answer fully any question on this form, use a separate sheet and identify each answer with the number of the corresponding question. ***Fill in with typewriter or print in block letters in ink.***

1. I hereby apply for status as indicated by the block checked below (check block A or B).

☐ A Temporary Residence as an alien who illegally entered the U.S. prior to January 1, 1982.

☐ B Temporary Residence as an alien who entered the U.S. as a nonimmigrant prior to January 1, 1982 and whose authorized stay expired before such date or whose unlawful status was known to the Government as of January 1, 1982.

2. Family Name (Last Name in CAPITAL Letters) (First Name) (Middle Name)

3. Date of Birth (Month/Day/Year)

4. Other Names Used or Known by (Including maiden name, if married)

5. Telephone Numbers (Include Area Codes)
Home:
Work:

6. Home Address in the U.S. (No. and Street) (Apt. No.) (City) (State) (ZIP Code)

7. Mailing Address in the U.S. (if different from #6.) (Apt. No.) (City) (State) (ZIP Code)

8. Last Address outside the U.S. (City or Town) (County, Province or State) (Country)

9. Sex ☐ Male ☐ Female

10. Race ☐ Asian or Pacific Islander ☐ Black, not of Hispanic origin ☐ Other (specify below) ☐ Hispanic ☐ White, not of Hispanic origin

11. Marital Status ☐ Never Married ☐ Divorced ☐ Now Married ☐ Separated ☐ Widowed

12. Country of Citizenship

13. Place of Birth (City or Town) (County, Province or State) (Country)

14. Have you previously applied for temporary residence as a legalization applicant?
☐ No ☐ Yes (If "Yes" give date, place of filing, and final disposition, if known)

15. Do you have any other record with I&NS?
☐ No ☐ Yes (If "Yes" give number(s))
A - ____________
Other ____________

16. When did you last come to the U.S.? (Month/Day/Year)

17. Manner of Entry (Visitor, Student, Crewman, etc.)
☐ With visa (visitor, student, etc.) specify ____________
☐ Without visa

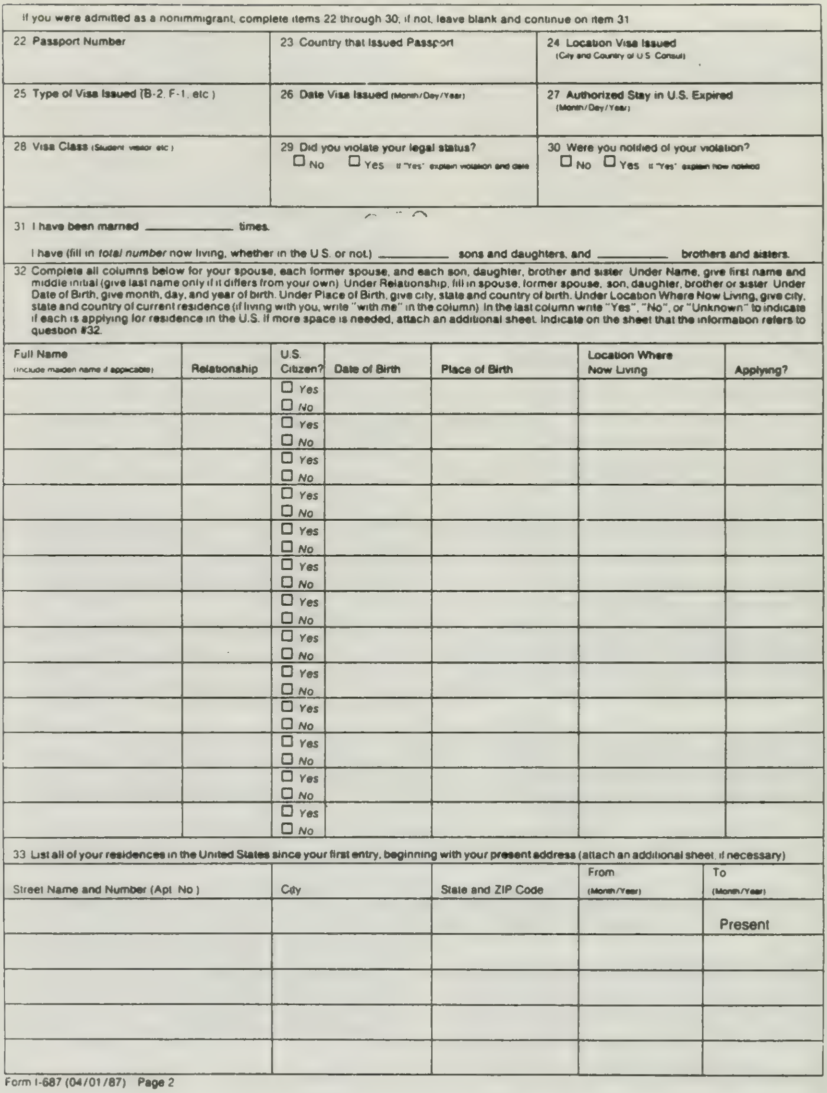
18. Place of Last Entry
☐ U.S. Port of entry (City and State) ____________
☐ Border - Not through port (State) ____________

19. List all Social Security Numbers used.
(1) (3)
(2) (4)

20. Mother's Name (Maiden) (Last) (First) ☐ Living ☐ Deceased *(year)* ______

21. Father's Name (Last) (First) ☐ Living ☐ Deceased *(year)* ______

I-687



If you were admitted as a nonimmigrant, complete items 22 through 30; if not, leave blank and continue on item 31

22 Passport Number	23 Country that Issued Passport	24 Location Visa Issued (City and Country of U.S. Consul)
25 Type of Visa Issued (B-2, F-1, etc.)	26 Date Visa Issued (Month/Day/Year)	27 Authorized Stay in U.S. Expired (Month/Day/Year)
28 Visa Class (Student, visitor, etc.)	29 Did you violate your legal status? ☐ No ☐ Yes If "Yes" explain violation and date	30 Were you notified of your violation? ☐ No ☐ Yes If "Yes" explain how notified

31 I have been married ____________ times.

I have (fill in *total number* now living, whether in the U.S. or not) __________ sons and daughters, and __________ brothers and sisters.

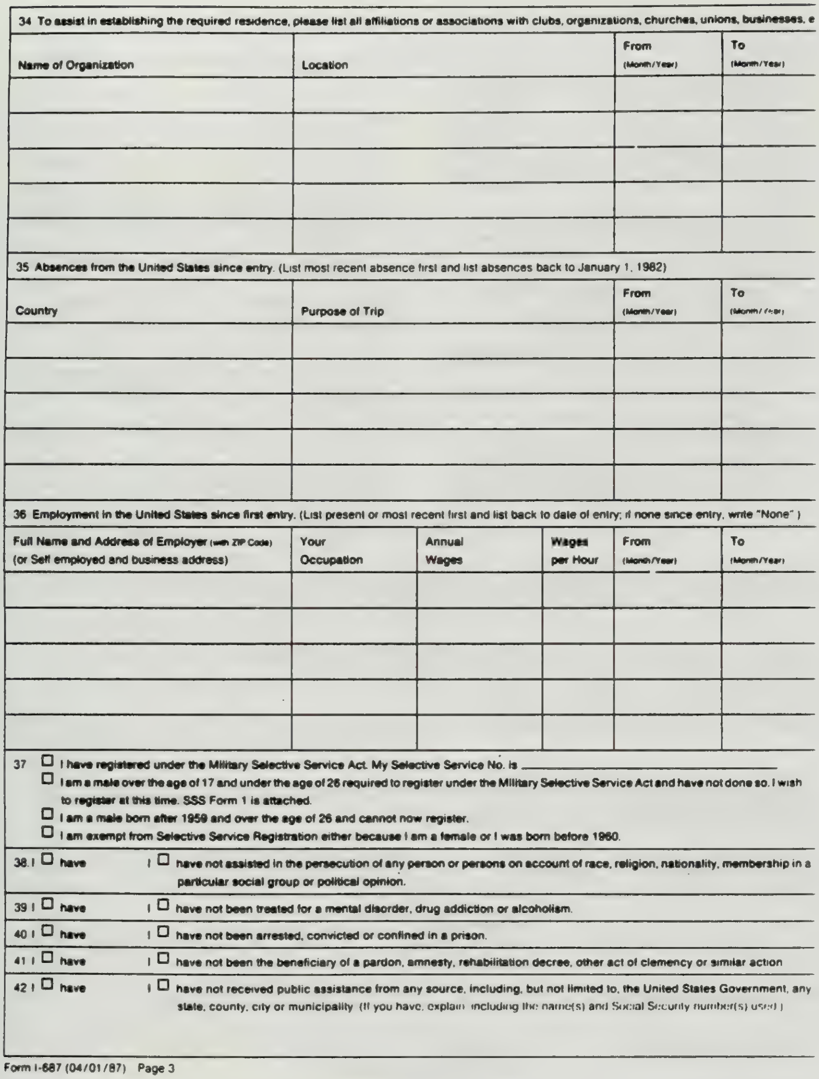
32 Complete all columns below for your spouse, each former spouse, and each son, daughter, brother and sister. Under Name, give first name and middle initial (give last name only if it differs from your own). Under Relationship, fill in spouse, former spouse, son, daughter, brother or sister. Under Date of Birth, give month, day, and year of birth. Under Place of Birth, give city, state and country of birth. Under Location Where Now Living, give city, state and country of current residence (if living with you, write "with me" in the column). In the last column write "Yes", "No", or "Unknown" to indicate if each is applying for residence in the U.S. If more space is needed, attach an additional sheet. Indicate on the sheet that the information refers to question #32.

Full Name (Include maiden name if applicable)	Relationship	U.S. Citizen?	Date of Birth	Place of Birth	Location Where Now Living	Applying?
		☐ *Yes* ☐ *No*				
		☐ *Yes* ☐ *No*				
		☐ *Yes* ☐ *No*				
		☐ *Yes* ☐ *No*				
		☐ *Yes* ☐ *No*				
		☐ *Yes* ☐ *No*				
		☐ *Yes* ☐ *No*				
		☐ *Yes* ☐ *No*				
		☐ *Yes* ☐ *No*				
		☐ *Yes* ☐ *No*				
		☐ *Yes* ☐ *No*				
		☐ *Yes* ☐ *No*				
		☐ *Yes* ☐ *No*				

33 List all of your residences in the United States since your first entry, beginning with your present address (attach an additional sheet, if necessary)

Street Name and Number (Apt. No.)	City	State and ZIP Code	From (Month/Year)	To (Month/Year)
				Present

Form I-687 (04/01/87) Page 2



34 To assist in establishing the required residence, please list all affiliations or associations with clubs, organizations, churches, unions, businesses, e

Name of Organization	Location	From (Month/Year)	To (Month/Year)

35 Absences from the United States since entry. (List most recent absence first and list absences back to January 1, 1982)

Country	Purpose of Trip	From (Month/Year)	To (Month/Year)

36 Employment in the United States since first entry. (List present or most recent first and list back to date of entry; if none since entry, write "None".)

Full Name and Address of Employer (with ZIP Code) (or Self employed and business address)	Your Occupation	Annual Wages	Wages per Hour	From (Month/Year)	To (Month/Year)

37 ☐ I have registered under the Military Selective Service Act. My Selective Service No. is ____________

☐ I am a male over the age of 17 and under the age of 26 required to register under the Military Selective Service Act and have not done so. I wish to register at this time. SSS Form 1 is attached.

☐ I am a male born after 1959 and over the age of 26 and cannot now register.

☐ I am exempt from Selective Service Registration either because I am a female or I was born before 1960.

38. I ☐ have I ☐ have not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group or political opinion.

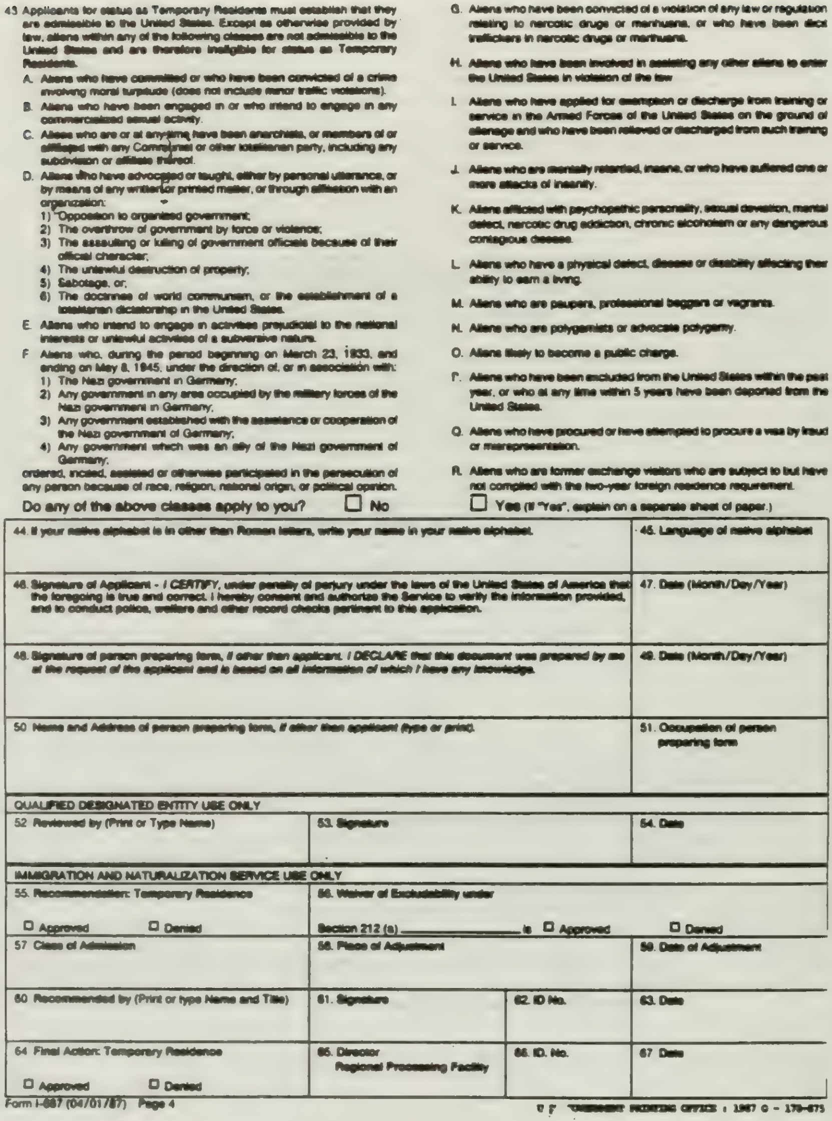
39 I ☐ have I ☐ have not been treated for a mental disorder, drug addiction or alcoholism.

40 I ☐ have I ☐ have not been arrested, convicted or confined in a prison.

41 I ☐ have I ☐ have not been the beneficiary of a pardon, amnesty, rehabilitation decree, other act of clemency or similar action

42 I ☐ have I ☐ have not received public assistance from any source, including, but not limited to, the United States Government, any state, county, city or municipality. (If you have, explain including the name(s) and Social Security number(s) used.)

Form I-687 (04/01/87) Page 3



43 Applicants for status as Temporary Residents must establish that they are admissible to the United States. Except as otherwise provided by law, aliens within any of the following classes are not admissible to the United States and are therefore ineligible for status as Temporary Residents.

A. Aliens who have committed or who have been convicted of a crime involving moral turpitude (does not include minor traffic violations).

B. Aliens who have been engaged in or who intend to engage in any commercialized sexual activity.

C. Aliens who are or at any time have been anarchists, or members of or affiliated with any Communist or other totalitarian party, including any subdivision or affiliate thereof.

D. Aliens who have advocated or taught, either by personal utterance, or by means of any written or printed matter, or through affiliation with an organization:
   1) Opposition to organized government;
   2) The overthrow of government by force or violence;
   3) The assaulting or killing of government officials because of their official character;
   4) The unlawful destruction of property;
   5) Sabotage, or;
   6) The doctrines of world communism, or the establishment of a totalitarian dictatorship in the United States.

E. Aliens who intend to engage in activities prejudicial to the national interests or unlawful activities of a subversive nature.

F. Aliens who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with:
   1) The Nazi government in Germany;
   2) Any government in any area occupied by the military forces of the Nazi government in Germany;
   3) Any government established with the assistance or cooperation of the Nazi government of Germany;
   4) Any government which was an ally of the Nazi government of Germany;

ordered, incited, assisted or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

G. Aliens who have been convicted of a violation of any law or regulation relating to narcotic drugs or marihuana, or who have been illicit traffickers in narcotic drugs or marihuana.

H. Aliens who have been involved in assisting any other aliens to enter the United States in violation of the law.

I. Aliens who have applied for exemption or discharge from training or service in the Armed Forces of the United States on the ground of alienage and who have been relieved or discharged from such training or service.

J. Aliens who are mentally retarded, insane, or who have suffered one or more attacks of insanity.

K. Aliens afflicted with psychopathic personality, sexual deviation, mental defect, narcotic drug addiction, chronic alcoholism or any dangerous contagious disease.

L. Aliens who have a physical defect, disease or disability affecting their ability to earn a living.

M. Aliens who are paupers, professional beggars or vagrants.

N. Aliens who are polygamists or advocate polygamy.

O. Aliens likely to become a public charge.

P. Aliens who have been excluded from the United States within the past year, or who at any time within 5 years have been deported from the United States.

Q. Aliens who have procured or have attempted to procure a visa by fraud or misrepresentation.

R. Aliens who are former exchange visitors who are subject to but have not complied with the two-year foreign residence requirement.

Do any of the above classes apply to you? ☐ No ☐ Yes (If "Yes", explain on a seperate sheet of paper.)

44. If your native alphabet is in other than Roman letters, write your name in your native alphabet.	45. Language of native alphabet
46. Signature of Applicant - *I CERTIFY*, under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. I hereby consent and authorize the Service to verify the information provided, and to conduct police, welfare and other record checks pertinent to this application.	47. Date (Month/Day/Year)
48. Signature of person preparing form, *if other than applicant. I DECLARE that this document was prepared by me at the request of the applicant and is based on all information of which I have any knowledge.*	49. Date (Month/Day/Year)
50 Name and Address of person preparing form, *if other than applicant (type or print).*	51. Occupation of person preparing form

QUALIFIED DESIGNATED ENTITY USE ONLY

52 Reviewed by (Print or Type Name)	53. Signature	54. Date

IMMIGRATION AND NATURALIZATION SERVICE USE ONLY

55. Recommendation: Temporary Residence ☐ Approved ☐ Denied	56. Waiver of Excludability under Section 212 (a) ______________ is ☐ Approved ☐ Denied		
57 Class of Admission	58. Place of Adjustment		59. Date of Adjustment
60 Recommended by (Print or type Name and Title)	61. Signature	62. ID No.	63. Date
64 Final Action: Temporary Residence ☐ Approved ☐ Denied	65. Director Regional Processing Facility	66. ID. No.	67 Date

Form I-687 (04/01/87) Page 4

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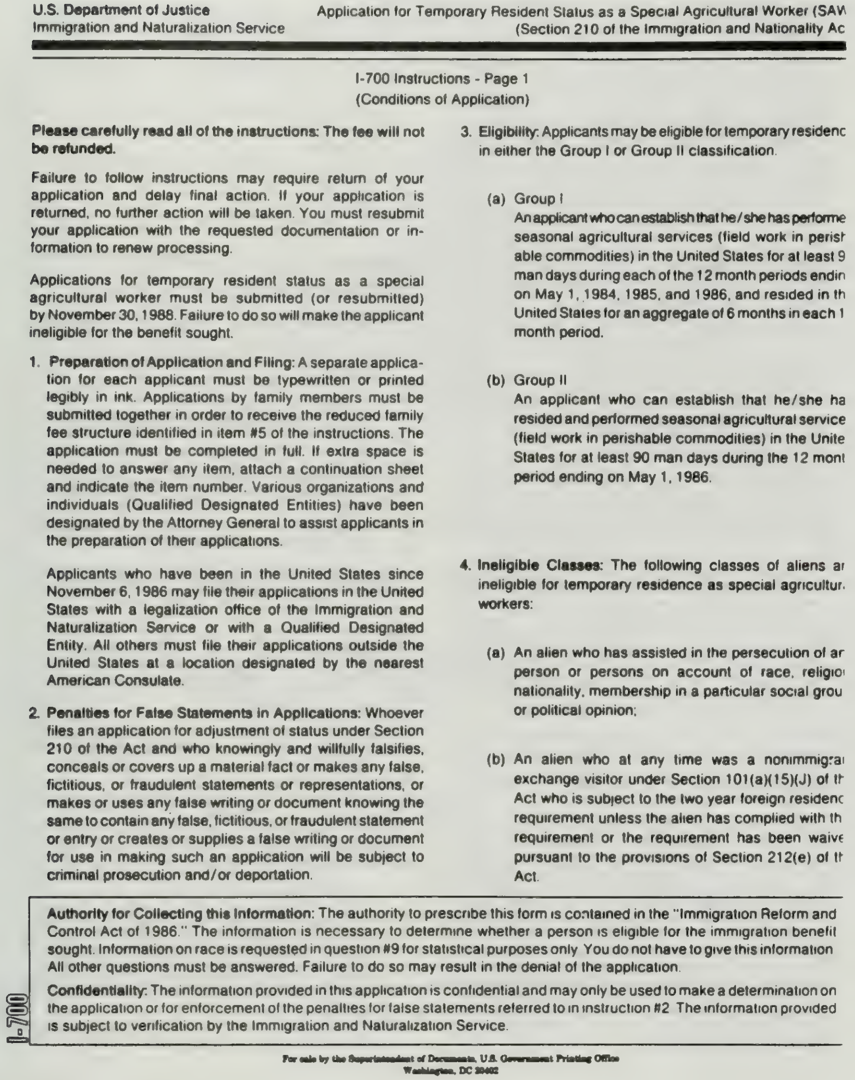
Appendix B



U.S. Department of Justice
Immigration and Naturalization Service

Application for Temporary Resident Status as a Special Agricultural Worker (SAV
(Section 210 of the Immigration and Nationality Ac

I-700 Instructions - Page 1
(Conditions of Application)

Please carefully read all of the instructions: The fee will not be refunded.

Failure to follow instructions may require return of your application and delay final action. If your application is returned, no further action will be taken. You must resubmit your application with the requested documentation or information to renew processing.

Applications for temporary resident status as a special agricultural worker must be submitted (or resubmitted) by November 30, 1988. Failure to do so will make the applicant ineligible for the benefit sought.

1. **Preparation of Application and Filing:** A separate application for each applicant must be typewritten or printed legibly in ink. Applications by family members must be submitted together in order to receive the reduced family fee structure identified in item #5 of the instructions. The application must be completed in full. If extra space is needed to answer any item, attach a continuation sheet and indicate the item number. Various organizations and individuals (Qualified Designated Entities) have been designated by the Attorney General to assist applicants in the preparation of their applications.

   Applicants who have been in the United States since November 6, 1986 may file their applications in the United States with a legalization office of the Immigration and Naturalization Service or with a Qualified Designated Entity. All others must file their applications outside the United States at a location designated by the nearest American Consulate.

2. **Penalties for False Statements in Applications:** Whoever files an application for adjustment of status under Section 210 of the Act and who knowingly and willfully falsifies, conceals or covers up a material fact or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry or creates or supplies a false writing or document for use in making such an application will be subject to criminal prosecution and/or deportation.

3. **Eligibility:** Applicants may be eligible for temporary residenc in either the Group I or Group II classification.

   (a) Group I
   An applicant who can establish that he/she has performe seasonal agricultural services (field work in perish able commodities) in the United States for at least 9 man days during each of the 12 month periods endin on May 1, 1984, 1985, and 1986, and resided in th United States for an aggregate of 6 months in each 1 month period.

   (b) Group II
   An applicant who can establish that he/she ha resided and performed seasonal agricultural service (field work in perishable commodities) in the Unite States for at least 90 man days during the 12 mont period ending on May 1, 1986.

4. **Ineligible Classes:** The following classes of aliens ar ineligible for temporary residence as special agricultur. workers:

   (a) An alien who has assisted in the persecution of ar person or persons on account of race, religio nationality, membership in a particular social grou or political opinion;

   (b) An alien who at any time was a nonimmigra exchange visitor under Section 101(a)(15)(J) of th Act who is subject to the two year foreign residenc requirement unless the alien has complied with th requirement or the requirement has been waive pursuant to the provisions of Section 212(e) of th Act.

Authority for Collecting this Information: The authority to prescribe this form is contained in the "Immigration Reform and Control Act of 1986." The information is necessary to determine whether a person is eligible for the immigration benefit sought. Information on race is requested in question #9 for statistical purposes only. You do not have to give this information. All other questions must be answered. Failure to do so may result in the denial of the application.

Confidentiality: The information provided in this application is confidential and may only be used to make a determination on the application or for enforcement of the penalties for false statements referred to in instruction #2. The information provided is subject to verification by the Immigration and Naturalization Service.

I-700

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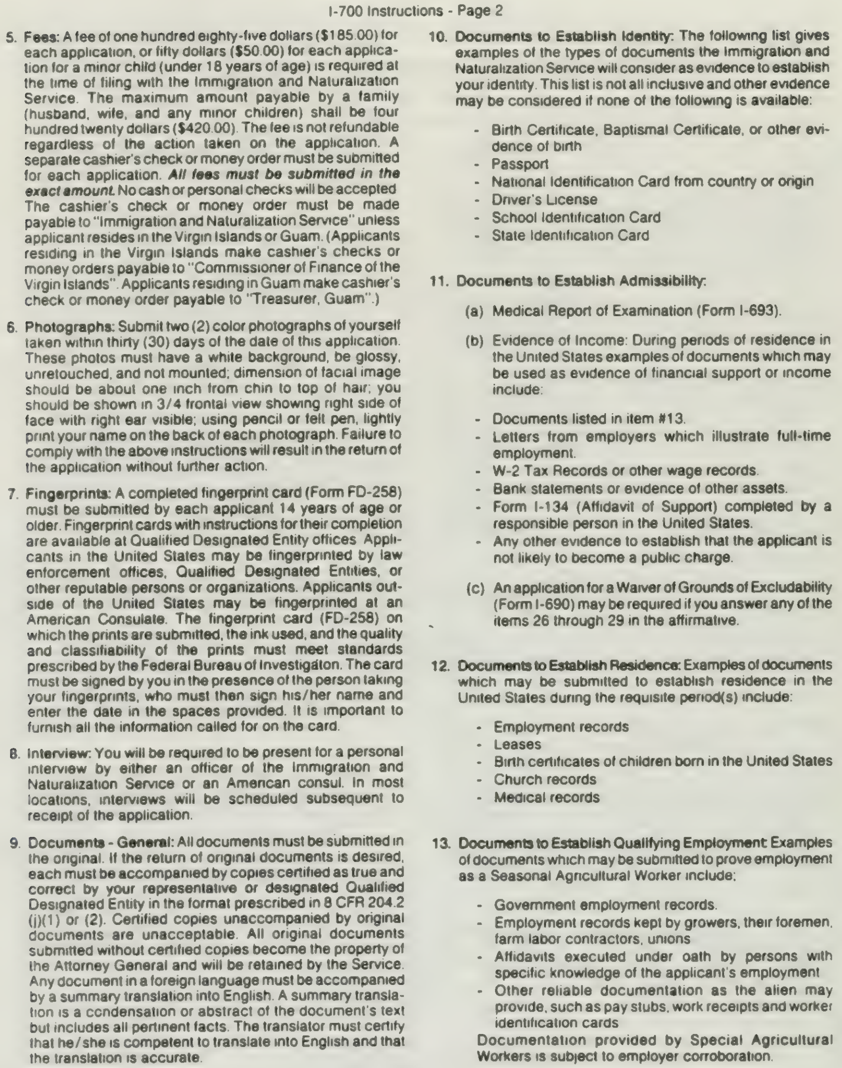
Washington, DC 20402



I-700 Instructions - Page 2

5. **Fees:** A fee of one hundred eighty-five dollars ($185.00) for each application, or fifty dollars ($50.00) for each application for a minor child (under 18 years of age) is required at the time of filing with the Immigration and Naturalization Service. The maximum amount payable by a family (husband, wife, and any minor children) shall be four hundred twenty dollars ($420.00). The fee is not refundable regardless of the action taken on the application. A separate cashier's check or money order must be submitted for each application. ***All fees must be submitted in the exact amount.*** No cash or personal checks will be accepted The cashier's check or money order must be made payable to "Immigration and Naturalization Service" unless applicant resides in the Virgin Islands or Guam. (Applicants residing in the Virgin Islands make cashier's checks or money orders payable to "Commissioner of Finance of the Virgin Islands". Applicants residing in Guam make cashier's check or money order payable to "Treasurer, Guam".)

6. **Photographs:** Submit two (2) color photographs of yourself taken within thirty (30) days of the date of this application. These photos must have a white background, be glossy, unretouched, and not mounted; dimension of facial image should be about one inch from chin to top of hair; you should be shown in 3/4 frontal view showing right side of face with right ear visible; using pencil or felt pen, lightly print your name on the back of each photograph. Failure to comply with the above instructions will result in the return of the application without further action.

7. **Fingerprints:** A completed fingerprint card (Form FD-258) must be submitted by each applicant 14 years of age or older. Fingerprint cards with instructions for their completion are available at Qualified Designated Entity offices Applicants in the United States may be fingerprinted by law enforcement offices, Qualified Designated Entities, or other reputable persons or organizations. Applicants outside of the United States may be fingerprinted at an American Consulate. The fingerprint card (FD-258) on which the prints are submitted, the ink used, and the quality and classifiability of the prints must meet standards prescribed by the Federal Bureau of Investigation. The card must be signed by you in the presence of the person taking your fingerprints, who must then sign his/her name and enter the date in the spaces provided. It is important to furnish all the information called for on the card.

8. **Interview:** You will be required to be present for a personal interview by either an officer of the Immigration and Naturalization Service or an American consul. In most locations, interviews will be scheduled subsequent to receipt of the application.

9. **Documents - General:** All documents must be submitted in the original. If the return of original documents is desired, each must be accompanied by copies certified as true and correct by your representative or designated Qualified Designated Entity in the format prescribed in 8 CFR 204.2 (j)(1) or (2). Certified copies unaccompanied by original documents are unacceptable. All original documents submitted without certified copies become the property of the Attorney General and will be retained by the Service. Any document in a foreign language must be accompanied by a summary translation into English. A summary translation is a condensation or abstract of the document's text but includes all pertinent facts. The translator must certify that he/she is competent to translate into English and that the translation is accurate.

10. **Documents to Establish Identity:** The following list gives examples of the types of documents the Immigration and Naturalization Service will consider as evidence to establish your identity. This list is not all inclusive and other evidence may be considered if none of the following is available:

    - Birth Certificate, Baptismal Certificate, or other evidence of birth
    - Passport
    - National Identification Card from country or origin
    - Driver's License
    - School Identification Card
    - State Identification Card

11. **Documents to Establish Admissibility:**

    (a) Medical Report of Examination (Form I-693).

    (b) Evidence of Income: During periods of residence in the United States examples of documents which may be used as evidence of financial support or income include:

    - Documents listed in item #13.
    - Letters from employers which illustrate full-time employment.
    - W-2 Tax Records or other wage records.
    - Bank statements or evidence of other assets.
    - Form I-134 (Affidavit of Support) completed by a responsible person in the United States.
    - Any other evidence to establish that the applicant is not likely to become a public charge.

    (c) An application for a Waiver of Grounds of Excludability (Form I-690) may be required if you answer any of the items 26 through 29 in the affirmative.

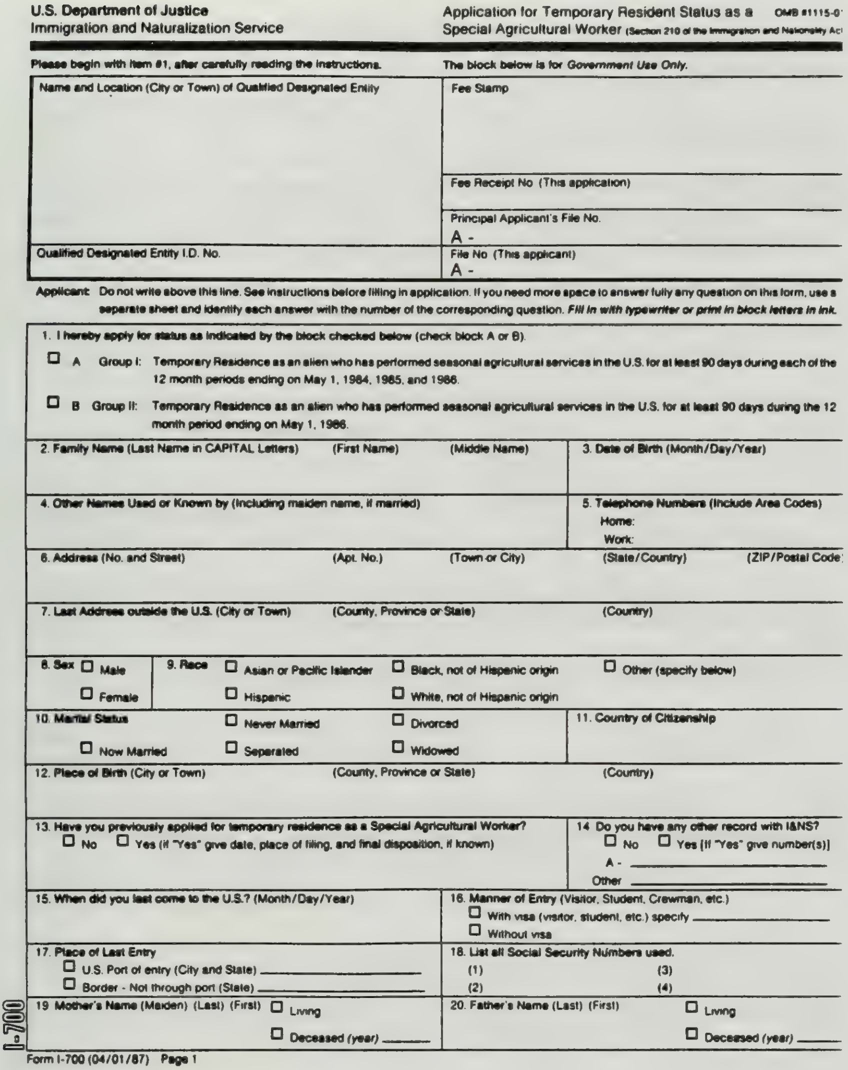
12. **Documents to Establish Residence:** Examples of documents which may be submitted to establish residence in the United States during the requisite period(s) include:

    - Employment records
    - Leases
    - Birth certificates of children born in the United States
    - Church records
    - Medical records

13. **Documents to Establish Qualifying Employment:** Examples of documents which may be submitted to prove employment as a Seasonal Agricultural Worker include:

    - Government employment records.
    - Employment records kept by growers, their foremen, farm labor contractors, unions
    - Affidavits executed under oath by persons with specific knowledge of the applicant's employment
    - Other reliable documentation as the alien may provide, such as pay stubs, work receipts and worker identification cards

    Documentation provided by Special Agricultural Workers is subject to employer corroboration.



U.S. Department of Justice
Immigration and Naturalization Service

Application for Temporary Resident Status as a Special Agricultural Worker (Section 210 of the Immigration and Nationality Ac
OMB #1115-0

Please begin with item #1, after carefully reading the instructions.

The block below is for *Government Use Only.*

Name and Location (City or Town) of Qualified Designated Entity

Fee Stamp

Fee Receipt No (This application)

Principal Applicant's File No.
A -

Qualified Designated Entity I.D. No.

File No (This applicant)
A -

Applicant: Do not write above this line. See instructions before filling in application. If you need more space to answer fully any question on this form, use a separate sheet and identify each answer with the number of the corresponding question. ***Fill in with typewriter or print in block letters in ink.***

1. I hereby apply for status as indicated by the block checked below (check block A or B).

☐ A Group I: Temporary Residence as an alien who has performed seasonal agricultural services in the U.S. for at least 90 days during each of the 12 month periods ending on May 1, 1984, 1985, and 1986.

☐ B Group II: Temporary Residence as an alien who has performed seasonal agricultural services in the U.S. for at least 90 days during the 12 month period ending on May 1, 1986.

2. Family Name (Last Name in CAPITAL Letters) (First Name) (Middle Name)

3. Date of Birth (Month/Day/Year)

4. Other Names Used or Known by (Including maiden name, if married)

5. Telephone Numbers (Include Area Codes)
Home:
Work:

6. Address (No. and Street) (Apt. No.) (Town or City) (State/Country) (ZIP/Postal Code

7. Last Address outside the U.S. (City or Town) (County, Province or State) (Country)

8. Sex ☐ Male ☐ Female

9. Race ☐ Asian or Pacific Islander ☐ Black, not of Hispanic origin ☐ Other (specify below) ☐ Hispanic ☐ White, not of Hispanic origin

10. Marital Status ☐ Never Married ☐ Divorced ☐ Now Married ☐ Seperated ☐ Widowed

11. Country of Citizenship

12. Place of Birth (City or Town) (County, Province or State) (Country)

13. Have you previously applied for temporary residence as a Special Agricultural Worker?
☐ No ☐ Yes (If "Yes" give date, place of filing, and final disposition, if known)

14 Do you have any other record with I&NS?
☐ No ☐ Yes [If "Yes" give number(s)]
A - __________________
Other __________________

15. When did you last come to the U.S.? (Month/Day/Year)

16. Manner of Entry (Visitor, Student, Crewman, etc.)
☐ With visa (visitor, student, etc.) specify ____________
☐ Without visa

17. Place of Last Entry
☐ U.S. Port of entry (City and State) ____________
☐ Border - Not through port (State) ____________

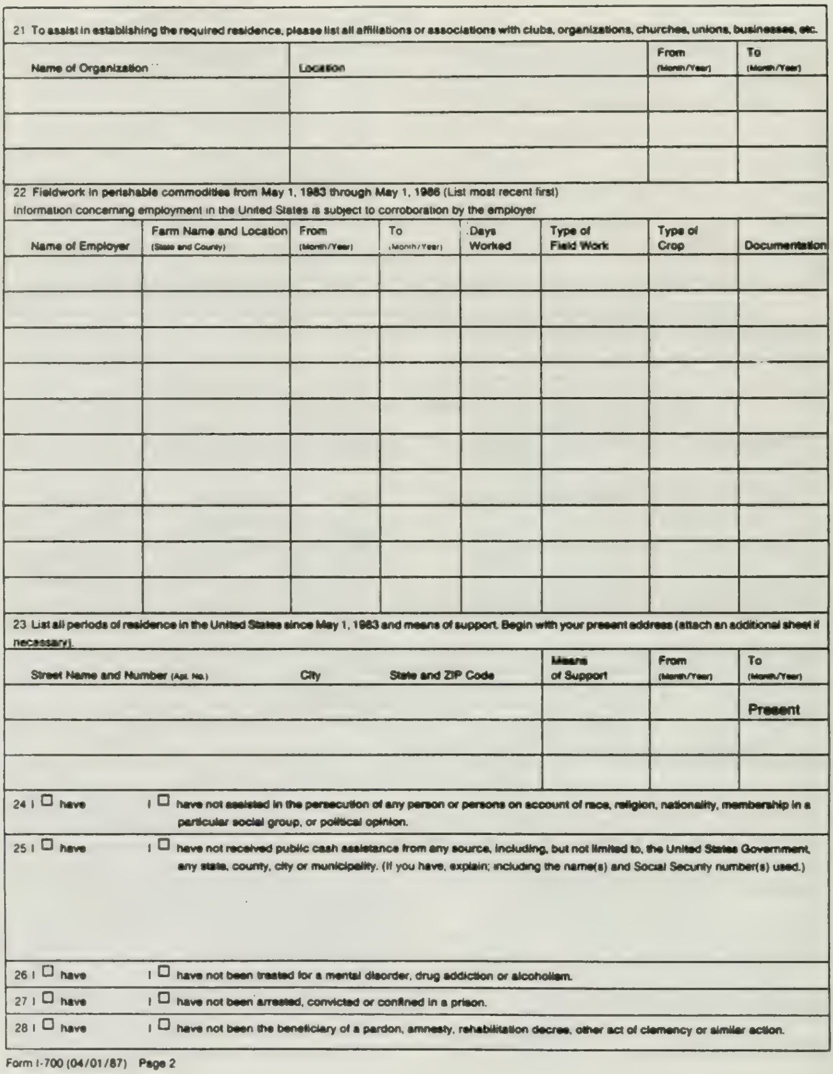
18. List all Social Security Numbers used.
(1) (3)
(2) (4)

19 Mother's Name (Maiden) (Last) (First) ☐ Living ☐ Deceased *(year)* ______

20. Father's Name (Last) (First) ☐ Living ☐ Deceased *(year)* ______

I-700

Form I-700 (04/01/87) Page 1



21 To assist in establishing the required residence, please list all affiliations or associations with clubs, organizations, churches, unions, businesses, etc.

Name of Organization	Location	From (Month/Year)	To (Month/Year)

22 Fieldwork in perishable commodities from May 1, 1983 through May 1, 1986 (List most recent first)
Information concerning employment in the United States is subject to corroboration by the employer

Name of Employer	Farm Name and Location (State and County)	From (Month/Year)	To (Month/Year)	Days Worked	Type of Field Work	Type of Crop	Documentation

23 List all periods of residence in the United States since May 1, 1983 and means of support. Begin with your present address (attach an additional sheet if necessary).

Street Name and Number (Apt. No.) City State and ZIP Code	Means of Support	From (Month/Year)	To (Month/Year)
			Present

24 I ☐ have I ☐ have not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion.

25 I ☐ have I ☐ have not received public cash assistance from any source, including, but not limited to, the United States Government, any state, county, city or municipality. (If you have, explain; including the name(s) and Social Security number(s) used.)

26 I ☐ have I ☐ have not been treated for a mental disorder, drug addiction or alcoholism.

27 I ☐ have I ☐ have not been arrested, convicted or confined in a prison.

28 I ☐ have I ☐ have not been the beneficiary of a pardon, amnesty, rehabilitation decree, other act of clemency or similar action.

Form I-700 (04/01/87) Page 2

29. Applicants for status as Temporary Residents must establish that they are admissible to the United States. Except as otherwise provided by law, aliens within any of the following classes are not admissible to the United States and are therefore ineligible for status as Temporary Residents.

A. Aliens who have committed or who have been convicted of a crime involving moral turpitude (does not include minor traffic violations).

B. Aliens who have been engaged in or who intend to engage in any commercialized sexual activity.

C. Aliens who are or at any time have been anarchists, or members of or affiliated with any Communist or other totalitarian party, including any subdivision or affiliate thereof

D. Aliens who have advocated or taught, either by personal utterance, or by means of any written or printed matter, or through affiliation with an organization:
   1) Opposition to organized government;
   2) The overthrow of government by force or violence;
   3) The assaulting or killing of government officials because of their official character;
   4) The unlawful destruction of property;
   5) Sabotage, or;
   6) The doctrines of world communism, or the establishment of a totalitarian dictatorship in the United States.

E. Aliens who intend to engage in activities prejudicial to the national interests or unlawful activities of a subversive nature.

F. Aliens who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with:
   1) The Nazi government in Germany;
   2) Any government in any area occupied by the military forces of the Nazi government in Germany;
   3) Any government established with the assistance or cooperation of the Nazi government of Germany;
   4) Any government which was an ally of the Nazi government of Germany;

ordered, incited, assisted or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

G. Aliens who have been convicted of a violation of any law or regulatio relating to narcotic drugs or marihuana, or who have been illic traffickers in narcotic drugs or marihuana.

H. Aliens who have been involved in assisting any other aliens to ente the United States in violation of the law.

I. Aliens who have applied for exemption or discharge from training o service in the Armed Forces of the United States on the ground o alienage and who have been relieved or discharged from such trainin or service.

J. Aliens who are mentally retarded, insane, or who have suffered one o more attacks of insanity.

K. Aliens afflicted with psychopathic personality, sexual deviation, menta defect, narcotic drug addiction, chronic alcoholism or any dangerous contagious disease.

L. Aliens who have a physical defect, disease or disability affecting thei ability to earn a living.

M. Aliens who are paupers, professional beggars or vagrants.

N. Aliens who are polygamists or advocate polygamy.

O. Aliens likely to become a public charge.

P. Aliens who have been excluded from the United States within the pas year, or who at any time within 5 years have been deported from th United States.

Q. Aliens who have procured or have attempted to procure a visa by frau or misrepresentation.

R. Aliens who are former exchange visitors who are subject to but hav not complied with the two-year foreign residence requirement.

Do any of the above classes apply to you? ☐ No ☐ Yes (If "Yes", explain on a seperate sheet of paper.)

30. If your native alphabet is in other than Roman letters, write your name in your native alphabet.	31. Language of native alphabet
32. Signature of Applicant - *I CERTIFY*, under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. I hereby consent and authorize the Service to verify the information provided, and to conduct police, welfare and other record checks pertinent to this application.	33. Date (Month/Day/Year)
34. Signature of person preparing form, *if other than applicant. I DECLARE* that this document was prepared by me at the request of the applicant and is based on all information on which I have any knowledge.	35. Date (Month/Day/Year)
36. Name and Address of person preparing form, *if other than applicant (type or print).*	37. Occupation of person preparing form

QUALIFIED DESIGNATED ENTITY USE ONLY

38. Reviewed by (Print or Type Name)	39. Signature	40. Date

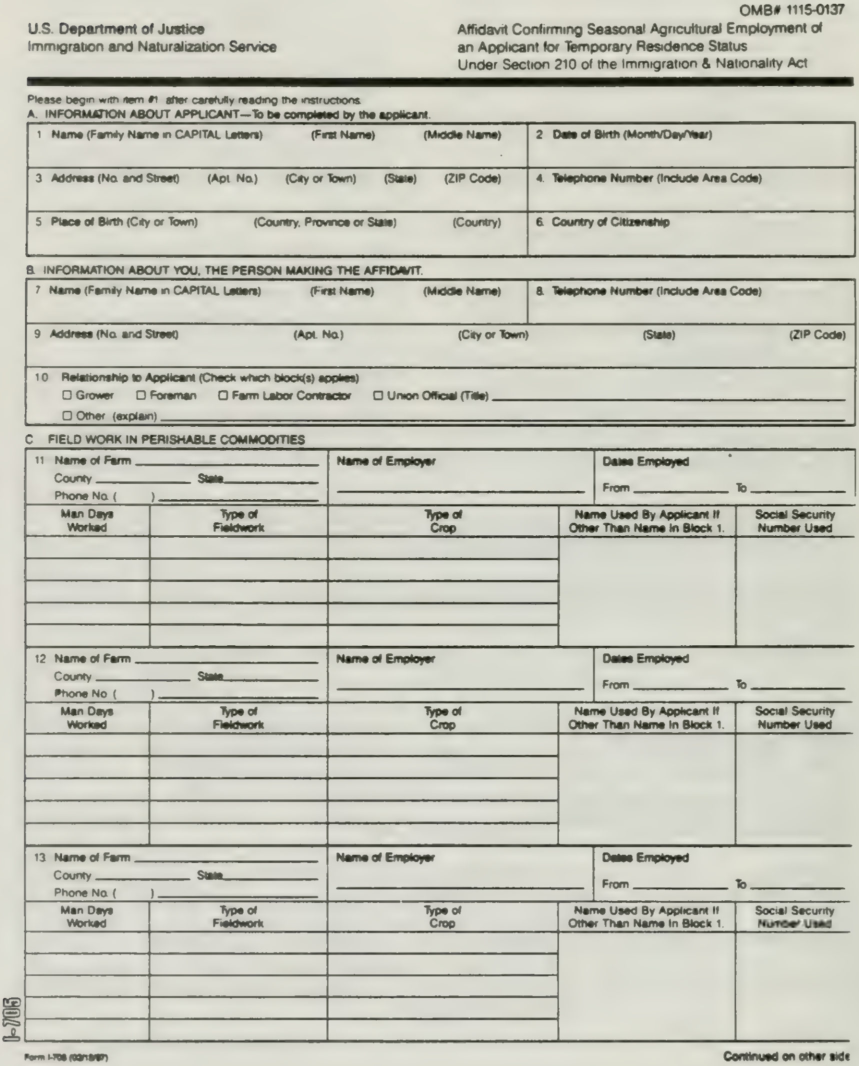
IMMIGRATION AND NATURALIZATION SERVICE USE ONLY

41. Recommendation: Temporary Residence ☐ Approved ☐ Denied	42. Waiver of Excludability under Section 212 (a) ______________ is ☐ Approved ☐ Denied		
43. Class of Admission	44. Place of Adjustment		45. Date of Adjustment
46. Recommended by (Print or type Name and Title)	47. Signature	48. ID No.	49. Date
50. Final Action: Temporary Residence ☐ Approved ☐ Denied	51. Director Regional Processing Facility	52. ID. No.	53. Date

I-700

U.S. GOVERNMENT PRINTING OFFICE : 1987 O - 179-9

Appendix C



OMB# 1115-0137

U.S. Department of Justice
Immigration and Naturalization Service

Affidavit Confirming Seasonal Agricultural Employment of an Applicant for Temporary Residence Status Under Section 210 of the Immigration & Nationality Act

Please begin with item #1 after carefully reading the instructions.

A. INFORMATION ABOUT APPLICANT—To be completed by the applicant.

1 Name (Family Name in CAPITAL Letters) (First Name) (Middle Name)	2 Date of Birth (Month/Day/Year)
3 Address (No. and Street) (Apt. No.) (City or Town) (State) (ZIP Code)	4. Telephone Number (Include Area Code)
5 Place of Birth (City or Town) (Country, Province or State) (Country)	6. Country of Citizenship

B. INFORMATION ABOUT YOU, THE PERSON MAKING THE AFFIDAVIT.

7 Name (Family Name in CAPITAL Letters) (First Name) (Middle Name)	8. Telephone Number (Include Area Code)

9 Address (No. and Street) (Apt. No.) (City or Town) (State) (ZIP Code)

10 Relationship to Applicant (Check which block(s) applies)
☐ Grower ☐ Foreman ☐ Farm Labor Contractor ☐ Union Official (Title) ____________
☐ Other (explain) ____________

C. FIELD WORK IN PERISHABLE COMMODITIES

11 Name of Farm ____________ County ________ State ________ Phone No. ( ) ________	Name of Employer ____________	Dates Employed From ________ To ________

Man Days Worked	Type of Fieldwork	Type of Crop	Name Used By Applicant If Other Than Name In Block 1.	Social Security Number Used

12 Name of Farm ____________ County ________ State ________ Phone No. ( ) ________	Name of Employer ____________	Dates Employed From ________ To ________

Man Days Worked	Type of Fieldwork	Type of Crop	Name Used By Applicant If Other Than Name In Block 1.	Social Security Number Used

13 Name of Farm ____________ County ________ State ________ Phone No. ( ) ________	Name of Employer ____________	Dates Employed From ________ To ________

Man Days Worked	Type of Fieldwork	Type of Crop	Name Used By Applicant If Other Than Name In Block 1.	Social Security Number Used

I-705

Form I-705 ([illegible])

Continued on other side

C AGRICULTURAL EMPLOYMENT (Continued)

14 **Identify the source of this information by checking the appropriate blocks below and state how you know the information to be true.** Records kept by: ☐ Grower, ☐ Union, ☐ Farm Labor Contractor or ☐ Personal Knowledge Statement.	15. **Please sign and submit copies of the documents identified in item #14 or state the reason(s) for not supplying such documents.** ☐ Signed, supporting documentation is attached ☐ Supporting documentation is not attached (explain) Statement:

16 **If the name of the applicant in block #1 is not the name under which the applicant worked as shown in Section C, please:**
(a) attach a recognizable photograph of the applicant and sign your name in ink across the back of the photograph, or
(b) explain how you know that the applicant is, in fact, the person who performed the work.

D. **I am willing to personally confirm this information, if requested. I declare and affirm under penalty of perjury that the information on this affidavit is true and correct to the best of my knowledge and belief.**

Signature of Affiant

Signature of Applicant

Form I 705 (02/21/87)

Instructions for Form I-705
Affidavit of Seasonal Agricultural Employment

1. **Preparation of Affidavit:**
This affidavit is to be completed under oath by agricultural producers, their foremen, union officials, farm labor contractors, or other persons with specific knowledge of the employment history of a person seeking temporary residence status as a Special Agricultural Worker (SAW). A separate affidavit must be completed for each applicant and must be typewritten or printed legibly in ink. The affidavit must be completed in full. If extra space is needed to answer any item, attach a continuation sheet and indicate the item number. Affiants may provide other information not requested on this form which may help to establish the performance of qualifying employment by the applicant.

2. **Eligibility Criteria for Special Agricultural Workers:**
Section 210 of the Immigration and Nationality Act provides for the granting of temporary residence status to aliens who have performed field labor in perishable agricultural commodities in the United States for at least 90 man-days during the twelve month period ending May 1, 1986. Aliens who can also document performance of field work in perishable commodities for at least 90 man-days in the years ending May 1, 1984 and May 1, 1985 will be adjusted to permanent resident status one year earlier than those who cannot. A man-day is any day in which not less than one hour of the requisite labor is performed for one or more employers.

3. **Confidentiality:**
As required by section 210 of the Act, the information provided in this affidavit is confidential and may only be used by the Immigration and Naturalization Service in making a determination on the application for temporary resident status filed by a special agricultural worker. The information furnished shall not be made available to any other government agency.

4. **Work Performed Under an Assumed Name:**
(a). Instructions for Applicant:
In cases where you worked under an assumed name, you must prove that you are, in fact, the person who used that name. To do this, you should provide a recognizable photograph of yourself for identification by the affiant.
(b). Instructions for Affiant:
If you recognize the applicant from the photograph as the person who performed the work, sign the back of the photograph in ink and attach it to the affidavit.

5. **Penalties for False Statements:**
Whoever provides information in support of an application under section 210 of the Act and who knowingly and willfully conceals or covers up a material fact or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry or creates or supplies a false writing or document for use in making such application will be subject to criminal prosecution. Such false information is not protected by the confidentiality provisions of section 210 of the Act.

GPO : 1987 O - 178-784

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, DC 20402

Appendix D

Application for Waiver of Grounds of Excludability
Under Sections 245A or 210 of the Immigration and Nationality Act

I-690 Instructions

Please carefully read all of the instructions.
The fee will not be refunded.

1. *Filing the Application*

   The application and supporting documentation should be taken or mailed to an American Consulate if the applicant is outside of the United States and is applying for temporary resident status as a Special Agricultural Worker.

   If the applicant is in the United States, a participating Qualified Designated Entity near your place of residence, or

   The Service legalization office having jurisdiction over the applicant's place of residence or employment.

2. *Fee*

   A fee of thirty-five dollars ($35.00), is required at the time of filing. The fee is not refundable regardless of the action taken on the application.

   A separate cashier's check or money order must be submitted for each application. ***All fees must be submitted in the exact amount.*** The fee must be in the form of a cashier's check or money order. No cash or personal checks will be accepted. The cashier's check or money order must be made payable to "Immigration and Naturalization Service" unless applicant resides in the Virgin Islands or Guam. (Applicants residing in the Virgin Islands make cashier's check or money order payable to "Commissioner of Finance of the Virgin Islands." Applicants residing in Guam make cashier's check or money order payable to "Treasurer, Guam."

   A fee is not required if this application is filed for an alien who:

   Is afflicted with tuberculosis;
   Is mentally retarded; or
   Has a history of mental illness.

3. ***Applicants with Tuberculosis.***

   An applicant with active tuberculosis or suspected tuberculosis must complete Statement A on page two of this form. The applicant and his or her sponsor is also responsible for having:

   Statement B completed by the physician or health facility which has agreed to provide treatment or observation, and

   Statement C, if required, completed by the appropriate local or state health officer.

   This form should then be returned to the applicant for presentation to the consular office, or to the appropriate office of the Immigration and Naturalization Service.

   Submission of the application without the required fully executed statements will result in the return of the application to the applicant without further action.

4. ***Applicants with Mental Conditions.***

   An alien who is mentally retarded or who has a history of mental illness shall attach a statement that arrangements have been made for the submission of a medical report, as follows, to the office where this form is filed:

   The medical report shall contain:

   A complete medical history of the alien, including details of any hospitalization or institutional care or treatment for any physical or mental condition;

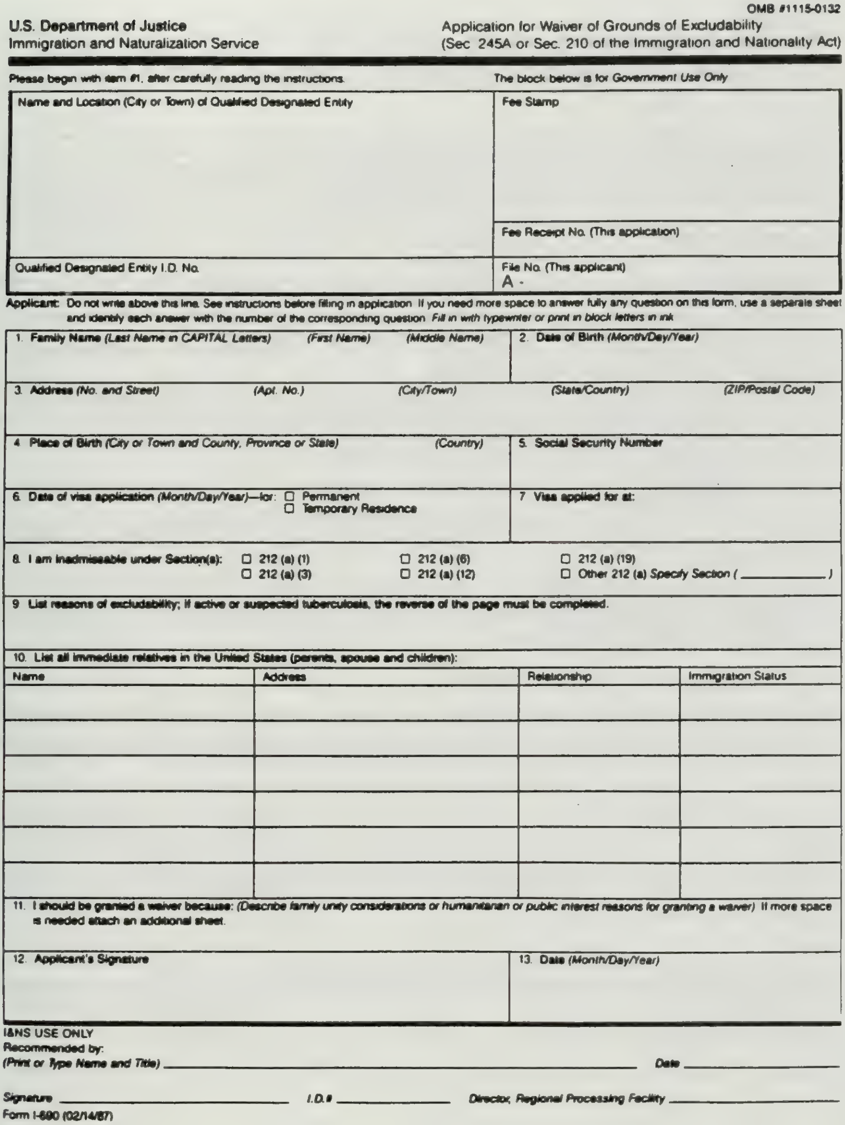
   Findings as to the current physical condition of the alien, including reports of chest X-rays and a serologic test if the alien is 15 years of age or older, and other pertinent diagnostic tests; and

   Findings as to the current mental condition of the alien, with information as to prognosis and life expectancy and with a report of a psychiatric examination conducted by a psychiatrist who shall, in case of mental retardation, also provide an evaluation of intelligence.

   For an alien with a past history of mental illness, the medical report shall also contain available information on which the United States Public Health Service can base a finding as to whether the alien has been free of such mental illness for a period of time sufficient in the light of such history to demonstrate recovery.

   The medical report will be referred to the United States Public Health Service for review and, if found acceptable, the alien will be required to submit such additional assurances as the United States Public Health Service may deem necessary in his or her particular case.

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, DC 20402



OMB #1115-0132

U.S. Department of Justice
Immigration and Naturalization Service

Application for Waiver of Grounds of Excludability
(Sec. 245A or Sec. 210 of the Immigration and Nationality Act)

Please begin with item #1, after carefully reading the instructions.

The block below is for *Government Use Only*

Name and Location (City or Town) of Qualified Designated Entity	Fee Stamp
	Fee Receipt No. (This application)
Qualified Designated Entity I.D. No.	File No. (This applicant) A -

Applicant: Do not write above this line. See instructions before filling in application. If you need more space to answer fully any question on this form, use a separate sheet and identify each answer with the number of the corresponding question. *Fill in with typewriter or print in block letters in ink.*

1. **Family Name** *(Last Name in CAPITAL Letters)* *(First Name)* *(Middle Name)*

2. **Date of Birth** *(Month/Day/Year)*

3. **Address** *(No. and Street)* *(Apt. No.)* *(City/Town)* *(State/Country)* *(ZIP/Postal Code)*

4. **Place of Birth** *(City or Town and County, Province or State)* *(Country)*

5. **Social Security Number**

6. **Date of visa application** *(Month/Day/Year)*—for: ☐ Permanent ☐ Temporary Residence

7. **Visa applied for at:**

8. **I am inadmissable under Section(s):** ☐ 212 (a) (1) ☐ 212 (a) (3) ☐ 212 (a) (6) ☐ 212 (a) (12) ☐ 212 (a) (19) ☐ Other 212 (a) *Specify Section* (__________)

9. **List reasons of excludability; if active or suspected tuberculosis, the reverse of the page must be completed.**

10. **List all immediate relatives in the United States (parents, spouse and children):**

Name	Address	Relationship	Immigration Status

11. **I should be granted a waiver because:** *(Describe family unity considerations or humanitarian or public interest reasons for granting a waiver)* If more space is needed attach an additional sheet.

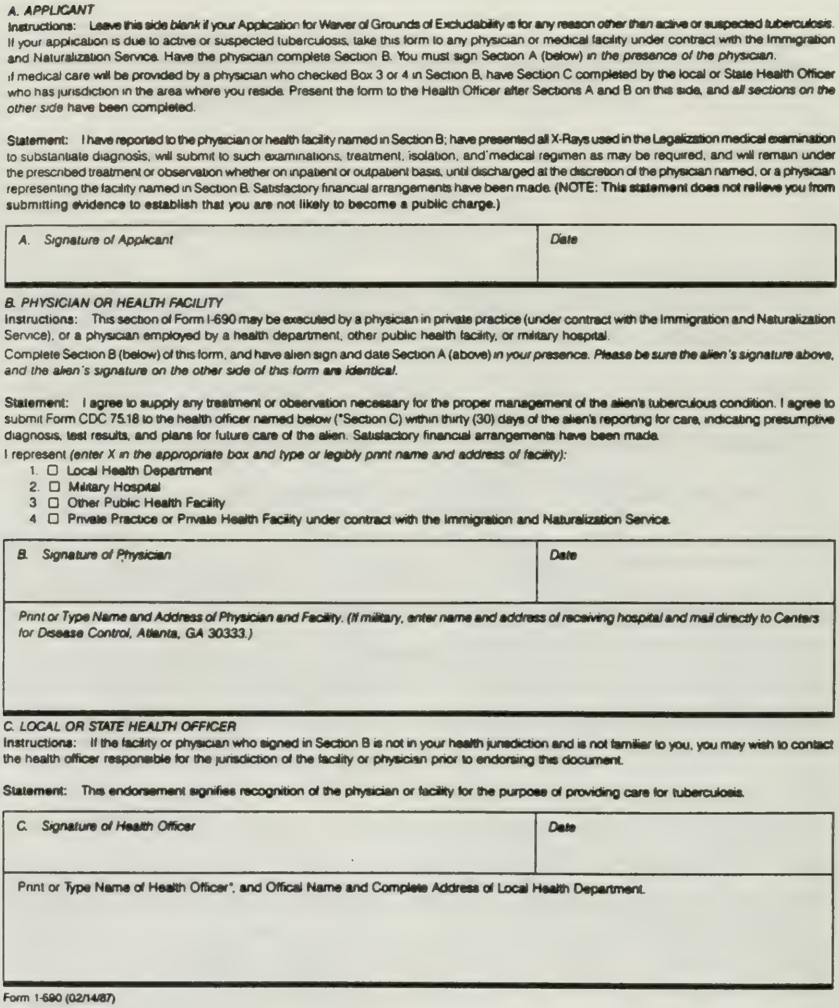
12. **Applicant's Signature**

13. **Date** *(Month/Day/Year)*

I&NS USE ONLY
Recommended by:
(Print or Type Name and Title) ____________________ *Date* __________

Signature ______________ *I.D.#* ________ *Director, Regional Processing Facility* ____________

Form I-690 (02/14/87)



A. APPLICANT

Instructions: Leave this side *blank* if your Application for Waiver of Grounds of Excludability is for any reason *other than* active or suspected *tuberculosis*. If your application is due to active or suspected tuberculosis, take this form to any physician or medical facility under contract with the Immigration and Naturalization Service. Have the physician complete Section B. You must sign Section A (below) *in the presence of the physician.*

If medical care will be provided by a physician who checked Box 3 or 4 in Section B, have Section C completed by the local or State Health Officer who has jurisdiction in the area where you reside. Present the form to the Health Officer after Sections A and B on this side, and *all sections on the other side* have been completed.

Statement: I have reported to the physician or health facility named in Section B; have presented all X-Rays used in the Legalization medical examination to substantiate diagnosis, will submit to such examinations, treatment, isolation, and medical regimen as may be required, and will remain under the prescribed treatment or observation whether on inpatient or outpatient basis, until discharged at the discretion of the physician named, or a physician representing the facility named in Section B. Satisfactory financial arrangements have been made. **(NOTE: This statement does not relieve you from submitting evidence to establish that you are not likely to become a public charge.)**

A. Signature of Applicant	*Date*

B. PHYSICIAN OR HEALTH FACILITY

Instructions: This section of Form I-690 may be executed by a physician in private practice (under contract with the Immigration and Naturalization Service), or a physician employed by a health department, other public health facility, or military hospital.

Complete Section B (below) of this form, and have alien sign and date Section A (above) *in your presence. Please be sure the alien's signature above, and the alien's signature on the other side of this form are identical.*

Statement: I agree to supply any treatment or observation necessary for the proper management of the alien's tuberculous condition. I agree to submit Form CDC 75.18 to the health officer named below (*Section C) within thirty (30) days of the alien's reporting for care, indicating presumptive diagnosis, test results, and plans for future care of the alien. Satisfactory financial arrangements have been made.

I represent *(enter X in the appropriate box and type or legibly print name and address of facility):*

1. ☐ Local Health Department
2. ☐ Military Hospital
3. ☐ Other Public Health Facility
4. ☐ Private Practice or Private Health Facility under contract with the Immigration and Naturalization Service.

B. Signature of Physician	*Date*
Print or Type Name and Address of Physician and Facility. (If military, enter name and address of receiving hospital and mail directly to Centers for Disease Control, Atlanta, GA 30333.)	

C. LOCAL OR STATE HEALTH OFFICER

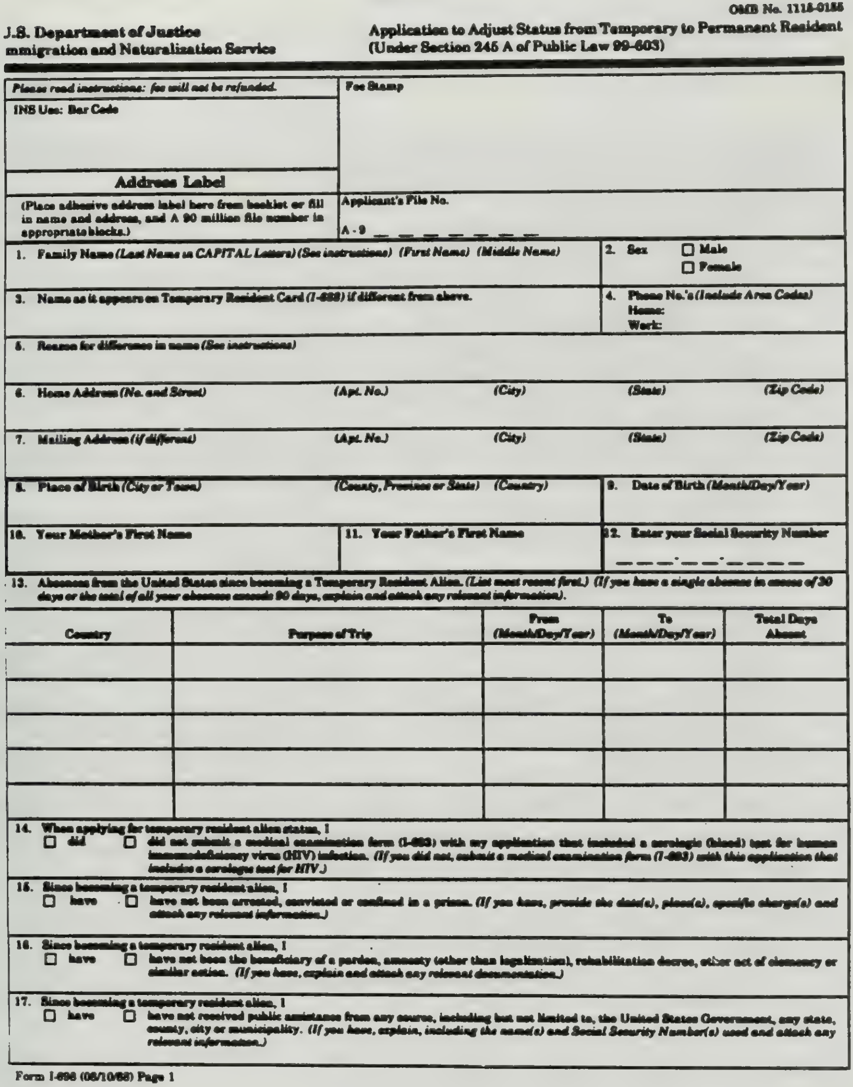
Instructions: If the facility or physician who signed in Section B is not in your health jurisdiction and is not familiar to you, you may wish to contact the health officer responsible for the jurisdiction of the facility or physician prior to endorsing this document.

Statement: This endorsement signifies recognition of the physician or facility for the purpose of providing care for tuberculosis.

C. Signature of Health Officer	*Date*
Print or Type Name of Health Officer*, and Offical Name and Complete Address of Local Health Department.	

Form I-690 (02/14/87)

Appendix E



OMB No. 1115-0155

J.S. Department of Justice
mmigration and Naturalization Service

Application to Adjust Status from Temporary to Permanent Resident
(Under Section 245 A of Public Law 99-603)

Please read instructions: fee will not be refunded.

Fee Stamp

INS Use: Bar Code

Address Label

(Place adhesive address label here from booklet or fill in name and address, and A 90 million file number in appropriate blocks.)

Applicant's File No.

A - 9 _ _ _ _ _ _ _

1. Family Name *(Last Name in CAPITAL Letters) (See instructions) (First Name) (Middle Name)*

2. Sex ☐ Male ☐ Female

3. Name as it appears on Temporary Resident Card *(I-688)* if different from above.

4. Phone No.'s *(Include Area Codes)*
Home:
Work:

5. Reason for difference in name *(See instructions)*

6. Home Address *(No. and Street) (Apt. No.) (City) (State) (Zip Code)*

7. Mailing Address *(if different) (Apt. No.) (City) (State) (Zip Code)*

8. Place of Birth *(City or Town) (County, Province or State) (Country)*

9. Date of Birth *(Month/Day/Year)*

10. Your Mother's First Name

11. Your Father's First Name

12. Enter your Social Security Number
_ _ _-_ _-_ _ _ _

13. Absences from the United States since becoming a Temporary Resident Alien. *(List most recent first.) (If you have a single absence in excess of 30 days or the total of all your absences exceeds 90 days, explain and attach any relevant information).*

Country	Purpose of Trip	From *(Month/Day/Year)*	To *(Month/Day/Year)*	Total Days Absent

14. When applying for temporary resident alien status, I
☐ did ☐ did not submit a medical examination form (I-693) with my application that included a serologic (blood) test for human immunodeficiency virus (HIV) infection. *(If you did not, submit a medical examination form (I-693) with this application that includes a serologic test for HIV.)*

15. Since becoming a temporary resident alien, I
☐ have ☐ have not been arrested, convicted or confined in a prison. *(If you have, provide the date(s), place(s), specific charge(s) and attach any relevant information.)*

16. Since becoming a temporary resident alien, I
☐ have ☐ have not been the beneficiary of a pardon, amnesty (other than legalization), rehabilitation decree, other act of clemency or similar action. *(If you have, explain and attach any relevant documentation.)*

17. Since becoming a temporary resident alien, I
☐ have ☐ have not received public assistance from any source, including but not limited to, the United States Government, any state, county, city or municipality. *(If you have, explain, including the name(s) and Social Security Number(s) used and attach any relevant information.)*

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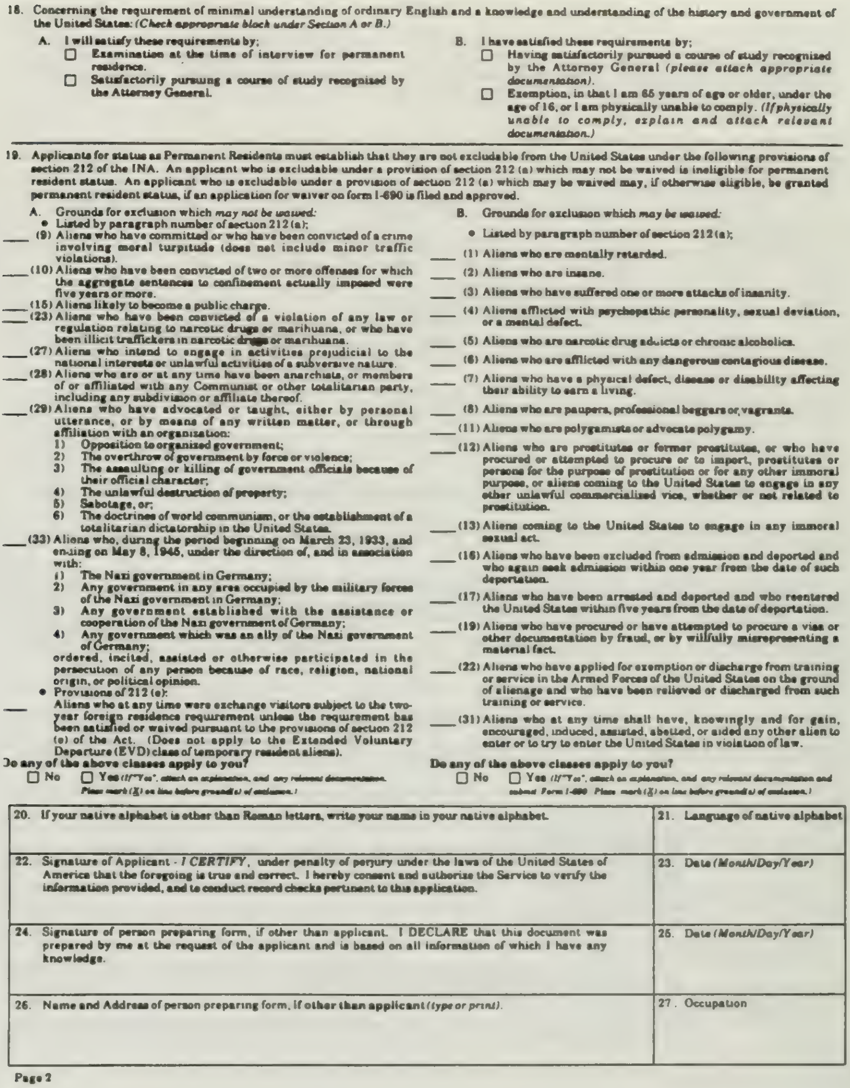

18. Concerning the requirement of minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States: *(Check appropriate block under Section A or B.)*

A. I will satisfy these requirements by;

☐ Examination at the time of interview for permanent residence.

☐ Satisfactorily pursuing a course of study recognized by the Attorney General.

B. I have satisfied these requirements by;

☐ Having satisfactorily pursued a course of study recognized by the Attorney General *(please attach appropriate documentation)*.

☐ Exemption, in that I am 65 years of age or older, under the age of 16, or I am physically unable to comply. *(If physically unable to comply, explain and attach relevant documentation.)*

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19. Applicants for status as Permanent Residents must establish that they are not excludable from the United States under the following provisions of section 212 of the INA. An applicant who is excludable under a provision of section 212 (a) which may not be waived is ineligible for permanent resident status. An applicant who is excludable under a provision of section 212 (a) which may be waived may, if otherwise eligible, be granted permanent resident status, if an application for waiver on form I-690 is filed and approved.

A. Grounds for exclusion which *may not be waived:*

- Listed by paragraph number of section 212 (a);

____ (9) Aliens who have committed or who have been convicted of a crime involving moral turpitude (does not include minor traffic violations).

____ (10) Aliens who have been convicted of two or more offenses for which the aggregate sentences to confinement actually imposed were five years or more.

____ (15) Aliens likely to become a public charge.

____ (23) Aliens who have been convicted of a violation of any law or regulation relating to narcotic drugs or marihuana, or who have been illicit traffickers in narcotic drugs or marihuana.

____ (27) Aliens who intend to engage in activities prejudicial to the national interests or unlawful activities of a subversive nature.

____ (28) Aliens who are or at any time have been anarchists, or members of or affiliated with any Communist or other totalitarian party, including any subdivision or affiliate thereof.

____ (29) Aliens who have advocated or taught, either by personal utterance, or by means of any written matter, or through affiliation with an organization:

1) Opposition to organized government;
2) The overthrow of government by force or violence;
3) The assaulting or killing of government officials because of their official character;
4) The unlawful destruction of property;
5) Sabotage, or;
6) The doctrines of world communism, or the establishment of a totalitarian dictatorship in the United States.

____ (33) Aliens who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, and in association with:

1) The Nazi government in Germany;
2) Any government in any area occupied by the military forces of the Nazi government in Germany;
3) Any government established with the assistance or cooperation of the Nazi government of Germany;
4) Any government which was an ally of the Nazi government of Germany;

ordered, incited, assisted or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

- Provisions of 212 (e):

____ Aliens who at any time were exchange visitors subject to the two-year foreign residence requirement unless the requirement has been satisfied or waived pursuant to the provisions of section 212 (e) of the Act. (Does not apply to the Extended Voluntary Departure (EVD) class of temporary resident aliens).

Do any of the above classes apply to you?

☐ No ☐ Yes *(If "Yes", attach an explanation, and any relevant documentation. Please mark (X) on line before ground(s) of exclusion.)*

B. Grounds for exclusion which *may be waived:*

- Listed by paragraph number of section 212 (a);

____ (1) Aliens who are mentally retarded.

____ (2) Aliens who are insane.

____ (3) Aliens who have suffered one or more attacks of insanity.

____ (4) Aliens afflicted with psychopathic personality, sexual deviation, or a mental defect.

____ (5) Aliens who are narcotic drug addicts or chronic alcoholics.

____ (6) Aliens who are afflicted with any dangerous contagious disease.

____ (7) Aliens who have a physical defect, disease or disability affecting their ability to earn a living.

____ (8) Aliens who are paupers, professional beggars or vagrants.

____ (11) Aliens who are polygamists or advocate polygamy.

____ (12) Aliens who are prostitutes or former prostitutes, or who have procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution or for any other immoral purpose, or aliens coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution.

____ (13) Aliens coming to the United States to engage in any immoral sexual act.

____ (16) Aliens who have been excluded from admission and deported and who again seek admission within one year from the date of such deportation.

____ (17) Aliens who have been arrested and deported and who reentered the United States within five years from the date of deportation.

____ (19) Aliens who have procured or have attempted to procure a visa or other documentation by fraud, or by willfully misrepresenting a material fact.

____ (22) Aliens who have applied for exemption or discharge from training or service in the Armed Forces of the United States on the ground of alienage and who have been relieved or discharged from such training or service.

____ (31) Aliens who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.

Do any of the above classes apply to you?

☐ No ☐ Yes *(If "Yes", attach an explanation, and any relevant documentation and submit Form I-690. Please mark (X) on line before ground(s) of exclusion.)*

20. If your native alphabet is other than Roman letters, write your name in your native alphabet.	21. Language of native alphabet
22. Signature of Applicant - *I CERTIFY*, under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. I hereby consent and authorize the Service to verify the information provided, and to conduct record checks pertinent to this application.	23. Date *(Month/Day/Year)*
24. Signature of person preparing form, if other than applicant. I DECLARE that this document was prepared by me at the request of the applicant and is based on all information of which I have any knowledge.	25. Date *(Month/Day/Year)*
26. Name and Address of person preparing form, if other than applicant *(type or print)*.	27. Occupation

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The Federal Personnel Complaint, Appeal, and Grievance Systems: A Structural Overview and Proposed Revisions*

By William V. Luneburg**

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Professor Jay M. Shafritz of the University of Pittsburgh Graduate School of Public and International Affairs reviewed the article in an earlier draft form. His comments were of great assistance to me in adding historical depth and shedding light on some of the legislative and administrative changes proposed herein. This article, however, purports to represent only my views and not necessarily his.

In addition Professors Candice Hoke, Thomas Cooley, Rona Pietrzak, and Carl Tobias all offered insightful comments which improved the final manuscript in a variety of ways. Frank Moore and Lisa Wakulchik, students at the University of Pittsburgh School of Law, provided essential research assistance. The School of Law provided additional funding support to assist in the completion of the article.

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** © Copyright 1989, William V. Luneburg. This article is derived from a report prepared for consideration by the Administrative Conference of the United States. It represents the views of the author and has not been adopted by the Administrative Conference or any of its committees. Professor Jay M. Shafritz of the University of Pittsburgh Graduate School of Public and International Affairs reviewed this article in an earlier draft form. His comments were of great assistance to me in adding historical depth to the report and shedding light on some of the legislative and administrative changes proposed herein. This report, however, purports to represent only my views, not necessarily his.

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INTRODUCTION

During the first two years of the Carter administration, the executive and legislative Branches engaged in the most systematic governmental review and revision of the federal civil service system since the enactment of the Pendleton Act in 1883.[1] The result was the Civil Service Reform Act of 1978[2] (CSRA), which created new institutions and processes for personnel management.

Early judgment on the successes and failures of such a significant restructuring of governmental organization likely guarantees deeply flawed impressions. Federal managers and employees who must work under the newly established systems, administrators charged with responsibility for breathing life into the bare bones frameworks created by Congress, and the courts responsible for discovering, extrapolating, and protecting the congressional design must have time to adjust to the new environment that faces them and, where discretion exists, experiment in ways necessary to carry out the purposes that animated the movement for reform. However, a decade has passed since the CSRA became law. Sufficient experience does exist that can reliably form the basis for conclusions regarding whether further legislative or regulatory changes are necessary at this time. Within the limited compass of this study, the basic finding is that the system is working reasonably well, though some modifications should be considered by both administrators and legislators.[3]

This report focuses exclusively on the processes now in place for adjudicating a wide variety of disputes between federal managers and their employees. The occasions for such disputes are multifarious, including dismissal from federal employment, reduction in pay or grade level, denials of promotion or within grade increases, and decisions concerning various benefits and awards. The framework for handling these controversies is characterized by overlapping jurisdiction among various agencies—specifically, the Merit Systems Protection Board (MSPB), the Federal Labor Relations Authority (FLRA), and the Equal Employment Opportunity Commission (EEOC)—and the employee's ability to choose from more than one remedial route. Further complications are introduced by the fact that the availability and nature of administrative relief vary depending on the employee's status and the type of personnel action taken by management. This elaborate framework of inclusion and exclusion has created much litigation regarding the availability of extra-statutory judicial remedies, including a considerable number of recent Supreme Court and court of appeals opinions.

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[1] The Civil Service Act of 1883, ch. 27, 22 Stat. 403 (1883) (current version at 5 U.S.C. § 1101).

[2] Civil Service Reform Act of 1978, P.L. 95-454, 92 Stat. 1111 (codified as 5 U.S.C. § 552).

[3] *See infra* notes 482-600 and accompanying text. For more radical proposals for statutory change, see Feder, "*Pick A Forum—Any Forum*": *A Proposal for A Federal Dispute Resolution Board*, 39 LAB. L.J. 268 (1989).

While a detailed examination of each of the processes available to protest an action taken by management that directly impacts an individual employee would doubtless be illuminating, this article concentrates on the principal structural issues that are presented by the existing system for handling personnel complaints, grievances, and appeals. These issues include the following: Is the negotiated grievance process available to employees included in collective bargaining units working acceptably well? Should employees retain the number of choices they now have among appeal routes for certain types of matters? Should they be able to pursue more than one avenue of relief, as is currently the situation regarding cases raising claims of discrimination? Can the multiple levels of review available in cases of discrimination that prolong and complicate cases be justified? Should the MSPB be given exclusive jurisdiction in certain types of cases raising claims of discrimination? Should the FLRA retain jurisdiction to review arbitral awards in personnel actions? Does the Office of Personnel Management have sufficient access to the reviewing courts in cases raising important issues of personnel law? Various limitations on this study and the reasons for them are noted at several points in the narrative.

In approaching the federal personnel complaint, grievance, and appeal system in this fashion, it is essential to realize that two factors powerfully shaped the basic contours of the legal topography created by the 1978 CSRA. First of all, there was concern that the responsibility for implementing and safeguarding federal sector equal employment opportunity programs be placed securely in the hands of an institution sympathetic to those statutes. Second, statutory recognition and expansion of the rights of federal unions and those they represented were crucial to the 1978 reform effort. In the political environment thus created, simplicity of process design and implementation of a unified federal personnel law did not prove to be legislative goals that were pursued uncompromisingly. Moreover, despite the passage of a decade, it is unlikely that the continued importance of the forces that shaped the 1978 legislation can be discounted by anyone proposing changes to the current system, at least if the proponent expects some success in his or her efforts at reform.

This article moves from descriptions of the evolution prior to 1978 of the framework for handling federal employee complaints and the principal features of the 1978 CSRA that create the structural issues under examination, to a discussion of empirical data and other information that fleshes out the actual workings of the various appeal routes and identification of the potential problems in the system, and finally to some proposed recommendations for statutory and regulatory reform.

I. Historical Antecedents and the Groundwork for Reform

A. *The Civil Service Commission and the Merit System*

The history of the federal civil service system to 1978 has been exhaustively described elsewhere.[4] For present purposes, only a brief synopsis is necessary. The Pendleton Act of 1883[5] established a merit system to regulate the appointment of personnel. The newly created Civil Service Commission was directed to provide for competitive examinations, fill vacancies on the basis of the results of those examinations, and insure that civil service was not used for political purposes.

The reformers tended to think that if the front door, or entrance to civil service, was protected from political influences, then the back door, or the question of removals, would take care of itself. Theoretically, there would be no incentive for a politically appointed or elected executive to remove an otherwise competent employee if he or she could not be replaced by a political cohort. Accordingly, the Pendleton Act of 1883 contained no protections against removals except in the case of the refusal of an employee to engage in political activity. The reform movement leaders actually supported quite openly management's absolute prerogative of removal. George William Curtis, one of the founders in 1881 9nd later the president of the National Civil Service Reform League, was supportive of management's unimpaired discretion. In commenting upon removal restrictions, he declared that

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[4] *See, e.g.*, R. Vaughn, Principles of Civil Service Law ch. 1 (1976). The two major histories of the American civil service are P. Van Riper, History of the United States Civil Service (1958) and F. Mosher, Democracy and the Public Service (1968).

[5] The Civil Service Act of 1883, *supra* note 1.

> it is better to take the risk of occasional injustice from passion and prejudice, which no law or regulation can control, than to seal up incompetence, negligence, insubordination, insolence, and every other mischief in the service, by requiring a virtual trial at law before [an] . . . incapable clerk can be removed.[6]

Viewed historically, the persistent abuse of management's prerogative of removal led to its curtailment. The new federal civil service law was hardly in effect when it became obvious that removals were being made for partisan reasons. The Civil Service Commission reported that it was common for employees of one political faith to be dismissed for offenses that were allowed to pass unnoticed or with a slight reprimand when committed by employees of the opposite party.[7] In addition, there developed the increasingly common practice of removals based upon secret charges, especially in the post office department. This led the highly influential National Civil Service Reform League, in 1886, to advocate placing the reasons for all removals in the public record.[8]

However, it was not until July 27, 1897, that an Executive Order of President McKinley provided that removals of employees in the classified service were not to be made except for "just cause."[9] In addition, covered employees had to be afforded a written statement of the reasons for the action and the right to make a written reply.[10] In 1912, Congress both enacted these protections into law and expanded them in the Lloyd-LaFollette Act.[11] Henceforth, classified service personnel could not be removed "except for such cause as will promote the efficiency of the service."[12] The act further provided for a written notice of reasons, a reasonable time to reply, and the opportunity to submit affidavits in support of the reply.[13] Moreover, employees were expressly permitted to petition Congress directly[14] on employment conditions and their right to affiliate with approved unions was recognized.

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[6] P. Van Riper, *supra* note 4, at 102.

[7] L. White, The Republican Era, 1869-1901: A Study in Administrative History 341 (1958).

[8] F. Stewart, The National Civil Service Reform League: History, Activities, and Problems 207 (1929).

[9] United States Civil Service Commission Annual Report XVIII, 282 (1901).

Under this statutory scheme, the Civil Service Commission initially conducted a procedural review, at most, of the removing officer's decision.[15] However, in 1930, it created a Board of Appeals and Review that ultimately assumed an expanded jurisdiction to review the merits of significant personnel actions.[16]

In 1944, the Veterans Preference Act[17] gave veterans statutory protections that went beyond those of the Lloyd-LaFollette Act. Covered veterans could not be "discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation or debarred from future appointment except for such cause as will promote the efficiency of the service."[18] The employee was to have at least thirty days advance written notice stating the reasons in detail, a reasonable time to answer both personally and in writing and to furnish affidavits in support of the answer, and the right to appeal on the merits to the Civil Service Commission. In addition, the veteran was to have the right to make a personal appearance or an appearance through his or her representative before the Commission. After investigation and consideration of the evidence, the Commission was to submit its findings and recommendations to the proper administrative officer.[19] Subsequently, the Act was amended to require agencies to take the corrective action recommended by the Commission and to give back pay to prevailing employees.[20]

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[10] 15 CSC Report 70 (1897-1898) (Rule II, Sec. 8).

[11] Lloyd-LaFollette Act, ch. 389, 37 Stat. 539 (1912) (current version at 5 U.S.C. § 5595).

[12] *Id.* at 555.

[13] *Id.*

[14] This provision negated President Theodore Roosevelt's so-called "gag orders," "executive orders in 1902 and 1904 that forbade federal employees, on pain of dismissal, to seek pay increases or to attempt to influence legislation before the Congress, either as individuals or as members of organizations, except through the heads of their departments." J. SHAFRITZ, THE DORSEY DICTIONARY OF AMERICAN GOVERNMENT AND POLITICS 239 (1988).

[15] *See* Guttman, *The Development and Exercise of Appellate Powers in Adverse Action Appeals*, 19 AM. U.L. REV. 323, 331-32 (1970).

[16] *Id.* at 332-34.

[17] Veterans Preference Act, ch. 287, 58 Stat. 387 (1944), *amended by* Act of June 22, 1948, ch. 602, 58 Stat. 575; Act of June 10, 1948, ch. 447, 58 Stat. 354; Act of March 30, 1966, 80 Stat. 94 (codified as amended in scattered sections of 5 U.S.C.).

[18] Veterans Preference Act, 58 Stat. 390.

Since more than half of the postwar federal service consisted of veterans, this changed the whole nature of removal proceedings. According to the second Hoover Commission, the impact of the Veteran's Act "was to close the 'open back door' which had always existed in the Federal Civil Service System."[21] For the first time department heads and their assistants had to approach dismissal actions with the thought that they might have to justify such actions to neutral third parties or to have their actions reversed.

As things stood in 1961, competitive (formerly classified) service employees who were not veterans were entitled only to the protections of the Lloyd-LaFollette Act and procedural review by the Civil Service Commission. Removals, including suspensions without pay for any period, were within the purview of that statute. Veterans in the competitive service were entitled to the same protections for the types of personnel actions not governed by the Veterans Preference Act, e.g., suspensions for thirty days or less. Regarding the types of personnel actions listed by the Veterans Preference Act, the veteran (whether competitive service or excepted service) was entitled to the procedural and substantive protections of the 1944 Act. In short, the type of procedural protection and appeal rights turned not only on the type of employee but also on the type of action taken.

As a result of congressional pressure, Executive Order 10,988 of January 17, 1962, extended the protections of the 1944 Veterans Preference Act to all federal employees in the competitive service.[22] At the same time, President Kennedy authorized an appeals system within federal agencies in accordance with regulations issued by the Civil Service Commission.[23] The principal exclusions from the substantive and procedural protections were probationers and nonveterans in the excepted service.

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[19] *Id.* at 390-91.

[20] Pub. L. 80-741 (June 22, 1948); *see supra* note 17.

[21] Commission on Organization of the Executive Branch of the Government, *Task Force Report on Personnel and Civil Service*, 95 (1955).

[22] Exec. Order No. 10,988, 3 C.F.R. 521 (1959-63).

[23] Exec. Order No. 10,987, 3 C.F.R. 519 (1959-63).

A multi-level appellate system resulted. A competitive service employee or veteran in the excepted service could appeal the type of adverse action defined by the Veterans Preference Act to an agency first level appellate office or directly to the Commission's first level appeals office. If the employee elected to appeal to the first level agency appellate office, he or she then could appeal, if unsuccessful, to either the first level Commission office or the second level agency appellate office. If he or she went the latter route, there was no appeal to the Commission. If the appellant appealed from the first level agency appeals office to a Civil Service Commission first level office, he then could appeal, if unsuccessful, to the Commission's second level appellate office (the Board of Appeals and Review). An appellant could obtain a hearing before an appeals examiner at both the agency and the Commission's first level offices. The Commissioners retained the authority to reopen the Board of Appeals and Review decisions.[24]

The appeals system that had grown up over the years did not escape criticism.[25] One of the most significant criticisms was the dual role assumed by the Commission as the federal government's central personnel agency and the guardian against improper removal and discipline of federal employees.[26] In addition, critics argued that "hearing procedures and officers needed to have more a judicial/legalistic orientation", that "decisions should be guided by the general body of the law and make reference to it", and that the Commission's decisions should be reported.[27]

In response to criticism, the appellate structure was reorganized in 1974. A Federal Employee Appeals Authority was established, consisting of several regional headquarters and first level appeals offices. The Board of Appeals and Review was renamed the Appeals Review Board, with the authority to correct errors and mistakes in field office decisions and to handle certain original jurisdiction cases. The Commissioners, however, retained the discretion to act as the final level of review in those cases where they felt such action was warranted. Agency appellate offices were abolished.[28]

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[24] Case, *Federal Employee Job Rights: the Pendleton Act of 1883 to the Civil Service Reform Act of 1978*, 29 How. L.J. 283, 292-93 (1986).

[25] *See, e.g.*, Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 Va. L. Rev. 196 (1973).

[26] *See, e.g.*, Guttman, *supra* note 15, at 340-48.

[27] *See* Case, *supra* note 24, at 294-95.

Despite these and other modifications in the Commission's method of operation, criticism did not abate. Concern continued over the combination in one agency of the power to both regulate federal employees' conduct and adjudicate appeals from disciplinary actions taken against them, and also the lack of formality in the hearing procedures and the decision-making process.[29]

B. Labor Relations and the Grievance Process

In 1962, the Presidential Task Force on Employee-Management Relations in the Federal Service recommended issuing an executive order granting federal employees limited bargaining rights.[30] Executive Order 10,988, issued on January 17, 1962, laid down the parameters of labor-management cooperation in the federal sector.[31] For present purposes, the most significant aspects of these administrative directives lie in their provision for negotiated grievance procedures and arbitration of employee complaints.[32]

The 1962 executive order provided that collective bargaining agreements could contain provisions designating procedures for the consideration of grievances. For various matters, employees had a choice between negotiated procedures and agency-established procedures. However, adverse actions continued to be appealable to the Civil Service Commission. There was a provision for arbitration in those instances where the grievance process did not satisfactorily resolve the dispute. The results of arbitration were advisory only; all determinations were subject to the approval of the agency head. Moreover, arbitration was limited to the interpretation and application of the collective bargaining agreement.[33]

Federal unions continued to press for limiting grievance resolution to the negotiated grievance procedures. In 1969, Executive

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[28] *Id.* at 295-96.

[29] *Id.* at 296.

[30] PRESIDENT'S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, A POLICY FOR EMPLOYEE-MANAGEMENT COOPERATION IN THE FEDERAL SERVICE (1961).

[31] Exec. Order No. 10,988, *supra* note 22, at 525.

[32] The historical description of the growth of grievance arbitration in the federal sector is taken largely from Smith & Wood, *Title VII of the Civil Service Reform Act of 1978: A "Perfect" Order?*, 31 HASTINGS L.J. 855 (1980); Comment, *Federal Sector Arbitration Under the Civil Service Reform Act of 1976*, 17 SAN DIEGO L. REV. 857 (1980).

[33] Smith & Wood, *supra* note 32, at 859-60.

Order 11,491[34] provided that the negotiated procedure would be the exclusive procedure available to grievants when the bargaining agreement so specified. Arbitration was no longer advisory. Rather, an award was final and binding subject to review by the Federal Labor Relations Council (FLRC). The FLRC's rules indicated that an award would be overturned where it violated "applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."[35] At the same time, adverse actions continued to be subject to the statutory appeals procedure.[36]

Some further changes were introduced in 1971 by Executive Order 11,616[37] and in 1975 by Executive Order 11,838.[38] Henceforth, grievance procedures were to be negotiated entirely by the parties and were not subject to civil service requirements.[39] The employee was to be represented by the exclusive union or someone approved by that union, unless the employee chose to represent himself or herself.[40] Adverse actions, subject to statutory appeal procedures, continued to be excluded from the negotiated grievance process.[41] Finally, arbitration could be invoked only by the agency-employer or the exclusive representative, not solely by the aggrieved employee.

The negotiated grievance/arbitration system that functioned under the aegis of these Executive Orders did not escape criticism. Concern was voiced over the absence of an "independent, impartial" body to oversee various aspects of the federal sector labor-management program, the exclusion from the negotiated procedures of matters subject to statutory appeals, and the limitation on arbitrators' authority to fashion remedies.[42]

C. *Equal Employment Opportunity*

Title VII of the Civil Rights Act of 1964 did not extend its protections to federal employees. However, Title VII did provide that federal sector employment decisions were to be free from discrimination.[43] Various executive orders to carry out this policy were issued, pursuant to which the Civil Service Commission established a regulatory system for considering complaints of discrimination. Still, "the availability of judicial remedies for discrimination in federal employment was doubtful because of the defense of sovereign immunity."[44]

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[34] Exec. Order No. 11,491, 3 C.F.R. §§ 861, 870 (1966-1970).

[35] 5 C.F.R. § 2411.32 (1978).

[36] *See* Smith & Wood, *supra* note 32, at 860-61.

[37] Exec. Order No. 11,616, 3 C.F.R. § 605 (1971-1975).

[38] Exec. Order No. 11,838, 3 C.F.R. § 957 (1971-1975).

[39] Exec. Order No. 11,616, *supra* note 37, at 606-07.

[40] *Id.* at 607.

[41] *See* Smith & Wood, *supra* note 32, at 861-62.

[42] *See* Comment, *supra* note 32, at 861-62.

In the Equal Employment Opportunity Act of 1972,[45] Congress formally extended the protections of Title VII of the Civil Rights Act of 1964 to the federal government. All personnel actions affecting employees or applicants for employment were to be made "free from any discrimination based on race, color, religion, sex, or national origin."[46] The House of Representatives bill would have given jurisdiction for administrative enforcement to the Equal Employment Opportunity Commission (EEOC).[47] This was prompted by a perceived conflict if the Civil Service Commission was responsible for both implementing federal personnel policies and practices and deciding appeals concerning allegations that those same policies and practices were discriminatory.[48] Ultimately, the House proposal was dropped because of Civil Service Commission opposition and concerns that the EEOC already had too great a work load.[49] The Civil Service Commission was given authority to enforce the anti-discrimination provisions through appropriate remedies, including reinstatement or hiring of employees with or without back pay, and to issue implementing regulations.[50] Within certain designated time frames, following agency action or inaction on a discrimination complaint, or Commission action on appeal from an agency decision, an aggrieved employee or applicant could bring a civil action for appropriate relief.[51] In *Chandler v. Roudebush*,[52] the Supreme Court held that, in such proceedings, federal employees were entitled to a trial *de novo*.

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[43] *See* 29 U.S.C. § 2000e(h)(1) (1982).

[44] *See* Laponsky, *Procedural Problems and Considerations in Representing Federal Employees in Equal Employment Opportunity Disputes*, 29 How. L.J. 503, 504-05 (1986).

[45] Equal Employment Opportunity Act, 86 Stat. 103 (1972) (codified at various sections of 5 U.S.C. and 42 U.S.C.).

[46] *Id.* at 141.

[47] Laponsky, *supra* note 44, at 505-06.

[48] *See id.*

[49] *See* Ralston, *The Federal Government as Employer: Problems and Issues in Enforcing the Anti-Discrimination Laws*, 10 Ga. L. Rev. 717, 717-18 (1975-76).

[50] Equal Employment Opportunity Act, *supra* note 45, at 111.

[51] *Id.* at 112, § 717(c).

[52] 425 U.S. 840 (1976).

Under its authority to establish regulations to carry out the legislation, the Civil Service Commission created a four-step administrative complaint process: pre-complaint counseling, investigation of a complaint, hearing and final agency decision, and, finally, an optional appeal to the Appeals Review Board of the Commission.[53] The investigators were employed by the agency, but complaints examiners, who made recommended decisions to the agency decision-maker, were employed by the Commission.[54] In *Morton v. Mancari*,[55] the Supreme Court held that the purpose of the 1972 Act was to make the substantive law of Title VII applicable to federal employment.

In 1974, the Age Discrimination in Employment Act was amended to encompass complaints of discrimination made by federal workers over forty years of age.[56] As in the case of the 1972 Equal Employment Opportunity Act, the Civil Service Commission was given remedial and rulemaking authority to carry out the purposes of the legislation.[57] Unlike the 1972 Act, there was no requirement of exhaustion of administrative remedies prior to filing a civil action to enforce the age discrimination protection.[58]

In 1978, the Rehabilitation Act of 1973 was amended. Henceforth, no "otherwise qualified handicapped individual" was to be subjected to discrimination under any program or activity conducted by any executive agency or the United States Postal Service.[59] The remedies, procedures, and rights established by the 1972 Equal Employment Opportunity Act, including both the exhaustion requirement and the right to *de novo* review, were made applicable in the case of handicap discrimination.[60]

The Civil Service Commission complaint process was also the object of some familiar criticism, some of which sounded a familiar note. Critics noted the apparently conflicting responsibilities of the Commission, the limited scope of the post-complaint investigation, the lack of provisions for the appointment of counsel to assist employees, the complexity of the procedures, the fact that agencies were "judges in their own cases" following the required hearing, and various departures from Title VII law as applied by the courts.[61]

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[53] *See* Ralston, *supra* note 49, at 724-25.

[54] *Id.* at 731.

[55] 417 U.S. 535, 547 (1974).

[56] Fair Labor Standards Amendments of 1974, 88 Stat. 55 (1974) (codified at 29 U.S.C. § 633a (1982)).

[57] *Id.* at 75 § 15(b).

[58] *Id.* at 75 § 15(d).

[59] Act of Nov. 6, 1978, 92 Stat. 2982 (1978) (codified at 29 U.S.C. § 794).

[60] 29 U.S.C. § 794a(a)(1) (1982).

D. The Personnel Management Project and the Enactment of the Civil Service Reform Act

By 1977, dissatisfaction with the personnel appeals, complaint, and negotiated grievance systems had a long history and similar problems infected each. In June 1977, President Carter established the Personnel Management Project to study the federal civil service system. The Project, while formally situated in the Civil Service Commission, made a decided effort to reach out to all federal agencies. There were a variety of study task forces, an Assistant Secretaries Advisory Group, public meetings, and a large number of informal meetings to which agency representatives were invited—all in an effort to maximize the involvement of career federal managers, representatives from the private sector, and academic specialists. Nevertheless, the actual drafting of proposed legislation was dominated by careerists under the direction of the Civil Service Commission leadership appointed by President Carter.[62]

The result of this effort was a Final Staff Report issued in December 1977.[63] The Report reiterated many of the previously mentioned problems and identified others. For example, the Report emphasized the confusing, complex, and time-consuming nature of the existing procedures.[64] Sources of complexity were found to lie in the wide range of appealable actions, the large number of appellate units and their unclear jurisdictional scheme, and finally, the possibility of pursuing certain actions in more than one forum.[65] The result was a network of processes seen as intimidating to employees who might, therefore, be discouraged or defeated in the attempted exercise of their rights. Alternatively, confronted by a system that imposed a burden to show an acceptable basis for an action in the context of proceedings that might drag on for years, some managers might avoid taking necessary actions to discharge or discipline employees.[66] The combination of functions of the Civil Service Commission as both the instructor and advisor of managers and the appellate organ for employee appeals was noted with concern.[67] Focusing on the discrimination complaint process, the Project noted the inadequacy of resources devoted to the system, the susceptibility of the system to misuse for nondiscriminatory matters, and the need for low cost or subsidized representation during certain stages of the process.[68]

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[61] *See, e.g.*, Ralston, *supra* note 49 at 726-35.

[62] For the history, see Huddleston, *The Carter Civil Service Reforms: Some Implications for Political Theory and Public Administration*, POL. SCI. Q. 96 (Winter 1981-82); Kramer, *Seeds of Success and Failure: Policy Development and Implementation of the 1978 Civil Service Reform Act*, REV. OF PUB. PERSONNEL ADMIN. 2 (Spring 1982).

[63] 1 PRESIDENT'S PERSONNEL MANAGEMENT PROJECT, FINAL STAFF REPORT 1 (Dec. 1977) [hereinafter FINAL STAFF REPORT].

[64] *Id.* at 58.

[65] *Id.*

The Final Staff Report made various recommendations for change[69] and President Carter sent Congress a proposed bill to amend the civil service laws in March, 1978. On October 13, 1978, he signed the Civil Service Reform Act of 1978. While there was substantial similarity to the proposals of the Personnel Management Project, the final legislation also differed in important ways.

II. THE STATUTORY AND REGULATORY FRAMEWORK FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMPLAINT, GRIEVANCE, AND PERSONNEL APPEALS PROCESSES

A. *The Institutions: Regulatory, Adjudicative, and Investigatory*

1. *The Office of Personnel Management*

As the successor to the administrative functions of the Civil Service Commission, the Office of Personnel Management (OPM) has statutory responsibility for executing, administering, and enforcing civil service laws, rules, and regulations other than those under the jurisdiction of the Merit Systems Protection Board.[70] OPM's multifarious and far-reaching authority and responsibilities make this agency the most powerful of the institutions created in 1978. For example, it adopts regulations for the release of employees in a reduction-in-force,[71] prescribes the parameters for agency performance appraisal systems,[72] and establishes the system for competitive examinations[73] and appointments to positions in the civil service.[74] The Office sometimes operates in an appellate capacity. It reviews classifications of positions on the request of agencies or employees,[75] the termination of grade or pay retention benefits following a reduction-in-force,[76] and examination ratings.[77]

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[66] *Id.* at 41.

[67] *Id.* at 53, 73.

[68] 2 PRESIDENT'S PERSONNEL MANAGEMENT PROJECT, FINAL STAFF REPORT 1, 19, 24 at Appendix IV (Dec. 1977).

[69] FINAL STAFF REPORT at 60-63.

[70] S. REP. No. 95-969, 95th Cong. 2d Sess. 5 (1978) [hereinafter 1978 S. REPORT]; *see* 5 U.S.C. § 1103(a)(5) (1982).

The OPM Director may petition the Court of Appeals for the Federal Circuit for review of a decision of the Merit Systems Protection Board "where the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive."[78] While OPM may petition for appeal, the granting of the petition is within the discretion of the Federal Circuit and the statute imposes no express limits on this discretion.[79] As the practice has evolved, the Federal Circuit grants OPM petitions for review only where the court independently believes that the Director's determinations are correct.[80] There is language in the legislative history to support the court's position.[81]

2. *The Merit Systems Protection Board*

Responding to concerns regarding the conflicting roles of the former Civil Service Commission as both management agent for the President and protector of the merit system from abuse,[82] Congress established the three-member Merit Systems Protection

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[71] 5 U.S.C. § 3502 (1982).

[72] 5 U.S.C. § 4302 (1982).

[73] 5 C.F.R. § 2.1 (1988).

[74] 5 C.F.R. § 2.2.

[75] 5 C.F.R. § 511.603.

[76] 5 C.F.R. §§ 536.101-536.307.

[77] 5 C.F.R. §§ 300.101-300.707.

[78] 5 U.S.C. § 7703(d) (1982).

[79] *Id.*

[80] *See, e.g.*, Horner v. Garza, 832 F.2d 150 (Fed. Cir. 1987); Devine v. Sutermeister, 724 F.2d 1558 (Fed. Cir. 1983).

[81] 1978 S. Report at 69.

[82] 1978 S. Report at 5.

Board (MSPB)[83] to function as an independent, quasi-judicial body adjudicating those matters placed within its jurisdiction by statute or regulation.[84] Other than various cases falling within its original

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[83] 5 U.S.C. § 1201 (1982).

[84] 5 U.S.C. § 1205(a)(1) (1982). Creation of the MSPB was not a sudden development. Demands for widespread reform had been growing since the 1930s when the President's Committee on Administrative Management chaired by Louis Brownlow made many recommendations for reform of the institutional structures of the federal civil service.

Overall, the Committee recommended a major reorganization of the executive branch. The President agreed, and appropriate legislation was submitted to the Congress in 1938. But the Congress, in the wake of the President's efforts to "pack" the Supreme Court and fearful of too much power in the Presidency, killed the bill. The President resubmitted a considerably modified reorganization bill the following year, and the Congress passed the Reorganization Act of 1939, authorizing the President, subject to congressional veto, to redistribute and restructure executive branch agencies. This allowed President Roosevelt to subsequently create the Executive Office of the President. For histories, see B.D. KARL, EXECUTIVE REORGANIZATION AND REFORM IN THE NEW DEAL (1963); R. POLENBERG, REORGANIZING ROOSEVELT'S GOVERNMENT: THE CONTROVERSY OVER EXECUTIVE REORGANIZATION, 1936-1939 (1966).

See President's Committee on Administrative Management, *Report with Special Studies* (1937). The Brownlow Committee's 1937 report was highly critical of the U.S. Civil Service Commission as a central personnel agency. After examining the Commission's various structural deficiencies, the Brownlow Committee recommended that

> [t]he Civil Service Commission . . . be reorganized into a Civil Service Administration, with a single executive officer, to be known as the civil service administrator, and a nonsalaried Civil Service Board of seven members appointed by the president. This board would be charged not with administrative duties but with the protection and development of the merit system in the government.

Id. at 9-10. While this proposal had the support of President Roosevelt, Congress would not adopt it until the same idea was resubmitted forty years later by President Carter.

What finally brought about this reform was a series of scandals during the latter part of the Nixon Administration that so discredited the U.S. Civil Service Commission that Congress was ready to act. It was demonstrated in a variety of congressional hearings that the Commission had presided over wholesale evasions of merit system requirements in order to make the federal civil service more politically responsive. *See, e.g.*, *Documents Relating to Political Influence in Personnel Actions at the General Services Administration. Subcommittee on Manpower and Civil Service*, Print no. 93-22, 93rd Cong., 2nd Sess. (1974); *Violations and Abuses of Merit Principles in Federal Employment Part I; Hearings Before the Subcommittee on Manpower and Civil Service*, Serial no. 94-19, 94th Cong., 1st Sess. (1975); *Violations and Abuses of Merit Principles in Federal Employment Part II. Hearings Before the Subcommittee on Manpower and Civil Service*, Serial no. 94-20, 94th Cong., 1st Sess. (1975); *Violations and Abuses of Merit Principles in Federal Employment. Hearing Before the Subcommittee on Manpower and Civil Service*, Serial no. 94-48, 94th Cong., 1st Sess. (1975); *Documents Relating to Political Influence in Personnel Actions at the Small Business Administration. Hearings Before the Subcommittee on Manpower and Civil Service*, Print no. 94-4, 94th Cong., 1st Sess. (1975); *Violations and Abuses of Merit Principles in Federal Employment. Hearing Before the Subcommittee on Post Office and Civil Service*, Serial no. 94-49, 94th Cong., 1st Sess. (1975). Finally, the Commission's own internal investigation, known as the Sharon Report (after Milton I. Sharon, the investigation's team director) confirmed allegations "that high-ranking officials of the Commission had had prior knowledge that politically oriented employment systems were in operation and had done nothing to stop them." Merit Staffing Review Team, *A Self-Inquiry Into Merit Staffing* 2 (United States Civil Service Commission, jurisdiction,[85] the MSPB's "appellate" jurisdiction extends over the most significant types of personnel actions, including reductions in grade or removal for unacceptable performance, removal from the civil service or lesser sanctions for disciplinary reasons, and separations due to reductions-in-force.[86]

To denominate the Board's jurisdiction as "appellate" may be somewhat misleading. It generally adjudicates cases coming to it on a *de novo* basis. Where an employee or applicant for employment is the subject of an action that is "appealable" to the Board under some statute or regulation, the "appellant" has the right to a hearing at which a transcript will be kept and to be represented by an attorney or other person.[87] In the manner of a judicial body regulating the conduct of cases to come before it, the Board has prescribed its procedures for hearing "appeals" in elaborate detail. The statute authorizes it to generally refer cases to designated employees of the Board, now called administrative judges, for hearing.[88] These administrative judges operate out of eleven regional offices, while the Board sits in Washington, D.C. The Board's rules prescribe the content of petitions for appeal and agency responses, lay down the conditions for intervention, consolidation of cases, and substitution of parties, authorize discovery of various kinds and impose limitations thereon, and prohibit *ex parte* communications.[89]

If dissatisfied with the initial decision of the administrative judge, the employee or agency may petition the full three-member Board for review.[90] While the Board may reopen and reconsider an initial decision on its own motion, the Board generally will grant petitions for review only when it has been established that

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May 1976). Of course, only a minority of individuals engaged in corrupt behavior, but that was enough to ruin a reputation. The Commission's "good name" could not be salvaged. "The stigma was so great that the reformers went so far as to formally assert that it was not the giant Office of Personnel Management that would be the successor agency to the Commission, but the little Merit Systems Protection Board. OPM would be a totally new entity—an organization without a history starting with a clean slate." J. SHAFRITZ, A.C. HYDE, D.H. ROSENBLOOM, PERSONNEL MANAGEMENT IN GOVERNMENT 21 (3rd ed. 1986). Thus, the MSPB, which the good government reformers of the Brownlow Committee recommended be created, would not be born until the Civil Service Commission, by its ineptness and corruption, destroyed itself.

[85] For example, actions against administrative law judges under 5 U.S.C. § 7521 (1982).

[86] *See, e.g.*, 5 C.F.R. § 1201.3 (1988).

[87] 5 U.S.C. § 7701(a)(1)-(2) (1982).

[88] 5 U.S.C. § 7701(b).

[89] *See* 5 C.F.R. §§ 1201.11-1201.113 (1988).

[90] 5 U.S.C. § 1201.114(a) (1988).

new and material evidence not available when the initial hearing record was closed has become available, or the decision of the administrative judge was based on an erroneous interpretation of statute or regulation.

Employees or applicants for employment adversely affected by a final order or decision of the Board may, except in cases involving alleged discrimination,[91] obtain judicial review in the United States Court of Appeals for the Federal Circuit.[92] That court may set aside Board action found to be arbitrary, capricious or an abuse of discretion, procedurally flawed, or unsupported by substantial evidence.[93]

Cases otherwise within the Board's jurisdiction that involve discrimination of particular types are subject to special procedures that will be described more fully below.[94]

3. *The Office of Special Counsel*

As specified in the Whistleblower Protection Act of 1989,[95] the Office of Special Counsel (OSC), first created in 1978,[96] has the primary role of protecting employees from "prohibited personnel practices"[97] by seeking corrective actions and the discipline of employees who commit such practices.[98] The OSC has a variety of statutory powers and duties. Only the most obviously relevant for current purposes will be discussed here.

The OSC must receive any allegation of a prohibited personnel practice and must investigate to the extent necessary to determine whether there are reasonable grounds to believe that such a practice has occurred, exists, or is to be taken.[99] The Special Counsel can also, on his or her own initiative, institute such an investigation.[100] If the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, and corrective action is required, he or she must report that determination along with any findings or recommendations to the MSPB, the Office of Personnel Management, and the agency involved.[101] If, after a reasonable time, the agency has not acted to correct the prohibited personnel practice, the OSC may request the MSPB to order corrective action.[102] At that point, the Board can order corrective action it considers appropriate and adversely affected employees may obtain judicial review of the Board's action in the Court of Appeals for the Federal Circuit.[103] Where the Special Counsel terminates an investigation not of his or her own initiation, he or she must prepare and transmit to the person who made the allegation a written statement notifying that person of the termination of the investigation, summarizing the facts ascertained by the OSC and the reasons for the termination.[104]

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[91] *See infra* notes 277-78 and accompanying text.

[92] *See* 5 U.S.C. § 7703(a)(1), (b)(1) (1982).

[93] 5 U.S.C. § 7703(c).

[94] *See infra* notes 198-202, 206-10, 218-79 and accompanying text.

[95] Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) [hereinafter Whistleblower Act].

[96] Civil Service Reform Act of 1978, *supra* note 2.

[97] The term "prohibited personnel practice" will be discussed *infra*, at notes 146-54 and accompanying text. For current purposes this can be taken to refer to various breaches of merit system principles.

[98] *See* Whistleblower Act, *supra* note 95, at § 2(b)(2)(A), (b)(2)(C).

[99] *Id.* at § 3(a)(11) (adding 5 U.S.C. § 1214(a)(1)(A)) (1982). Employees may be able to sue to force the OSC to conduct an "adequate" investigation. *See, e.g.*, Barnhart v. Devine, 771 F.2d 1515, 1524-25 (D.C. Cir. 1985); Wren v. Merit Sys. Protection Bd., 681 F.2d 867, 875-76 n.9 (D.C. Cir. 1982).

In addition, the OSC is directed to conduct an investigation of any allegation concerning "activities prohibited by any civil service law, rule, or regulation" and "involvement by an employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action."[105] However, the obligation to investigate the latter is excused where the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure.[106] The Special Counsel may seek corrective and disciplinary action from the MSPB based on the conduct investigated.[107]

The Special Counsel may request from the MSPB a stay of a personnel action where there is reason to believe that the action was taken as a result of a prohibited personnel practice.[108] Also, he or she may determine that disciplinary action is warranted against a federal employee for engaging in a prohibited personnel practice or violating other laws or regulations within OSC jurisdiction, in which case the Special Counsel must prepare a written complaint and present that to the MSPB.[109] After a hearing before the Board, the MSPB may impose various sanctions including removal, reduction in grade, debarment from federal employment for up to five years, or a civil penalty.[110] Judicial review of orders imposing disciplinary action are reviewable in the Federal Circuit.[111]

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[100] 5 U.S.C. § 1214(a)(5).

[101] 5 U.S.C. § 1214(b)(2)(A).

[102] 5 U.S.C. § 1214(b)(2)(B). *See Barnhart*, 771 F.2d at 1526 ("[There is] limited judicial review of the OSC's determination that the complaint does not merit the Board's consideration.").

[103] 5 U.S.C. §§ 1214(b)(4)(A) and (C).

[104] 5 U.S.C. § 1214(a)(2)(A).

[105] 5 U.S.C. § 1216(a)(4), (5).

[106] 5 U.S.C. § 1216(b).

[107] 5 U.S.C. § 1216(c)(2).

[108] 5 U.S.C. § 1214(b)(1)(A)(i).

4. *The Federal Labor Relations Authority*

Responding to a variety of concerns, including the need for an impartial body to oversee federal labor-management relations and to eliminate the existing fragmentation of authority between the Department of Labor and the Federal Labor Relations Council,[112] the Federal Labor Relations Authority (FLRA) was created in 1978.[113] In many ways it was modelled on the National Labor Relations Board. Its responsibilities include determination of the appropriateness of units for labor organization representation, supervising and conducting elections to determine whether a labor organization has been selected as the exclusive representative by employees in a unit, resolving issues relating to the duty to bargain in good faith, conducting hearings and resolving complaints of unfair labor practices, and resolving exceptions to arbitration awards arising from disputes subject to negotiated grievance procedures.[114]

The General Counsel of the FLRA is charged with the duty of investigating allegations of unfair labor practices, though he or she has the discretion whether to issue a complaint and proceed with a hearing before the FLRA.[115] Where a complaint is filed, an adjudicatory hearing is held before an administrative law judge[116] that may result in a cease and desist order and a requirement to reinstate an employee with back pay.[117] The FLRA is authorized, but not required, to petition a United States Court of Appeals for enforcement of its orders.[118] Judicial review of the FLRA's orders takes place in the regional courts of appeal.[119]

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[109] 5 U.S.C. § 1215(a).

[110] 5 U.S.C. § 1215(a)(3).

[111] 5 U.S.C. § 1215(a)(4).

[112] 1978 S. Report at 7-8.

[113] *See* 5 U.S.C. § 7104 (1982).

[114] 5 U.S.C. § 7105.

[115] 5 U.S.C. § 7118(a) (1982). *See also* American Federation of Government Employees v. FLRA, 842 F.2d 102 (5th Cir. 1988) (holding that a decision by the General Counsel not to issue an unfair labor practice complaint was not a final order of the Authority subject to judicial review).

[116] 5 U.S.C. § 7118(a)(6). *See also* 5 C.F.R. § 2423 (1989).

Employee grievances subject to negotiated grievance procedures contained in collective bargaining agreements may result in arbitration awards.[120] Generally, any party to arbitration may file with the FLRA an exception to an award. Still, the award may be overturned only if the FLRA finds that it is contrary to "any law, rule, or regulation" or that it is deficient on "grounds similar to those applied by Federal courts in private sector labor-management relations."[121] If no exception to an award is timely filed, it is "final and binding" and the agency must take the actions required by it.[122] The FLRA's action with regard to an arbitration award is not subject to judicial review unless the order involves an unfair labor practice.[123]

5. *Equal Employment Opportunity Commission*

Pursuant to Reorganization Plan No. 1 of 1978[124] and the 1978 Civil Service Reform Act,[125] the Equal Employment Opportunity Commission (EEOC) inherited from the Civil Service Commission the responsibility for enforcing Title VII and other anti-discrimination statutes in federal employment.[126]

Regarding personnel actions not appealable to the MSPB where discrimination is alleged, the EEOC regulations for processing complaints mirror to a great degree those of the former Civil Service Commission.[127] Generally, a person who believes that he or she has been discriminated against because of race, color, religion, sex, national origin, age, or handicap condition must first consult with an EEOC counselor within his or her agency who will make whatever inquiry is deemed necessary, seek a solution on an informal basis, and advise the employee concerning "the issues in the matter."[128] Following counseling, the employee may file a formal complaint with his or her agency,[129] which may be rejected for various procedural reasons such as timeliness or the pendency of an identical complaint.[130] The agency then must designate an employee or other person to conduct an investigation of the circumstances of the complaint.[131] Following the completion of the investigation and the complainant's review of the investigation file, the agency must provide an opportunity for adjustment of the complaint on an informal basis.[132] If no adjustment takes place, the complainant is informed of the proposed agency disposition of the complaint and of the right to a hearing and then a decision by an appropriate agency official.[133] Any hearing is conducted generally by an administrative judge who is the employee of the EEOC.[134] That presiding official is charged with determining whether further investigation is needed before a hearing is held and then with insuring that all pertinent facts are brought out at the hearing.[135] If the administrative judge determines that there are no issues of material fact, he or she may decide the case without a hearing.[136] The hearing officer recommends a decision that may be accepted or rejected by the agency head or his or her designee.[137] Complaints are to be resolved within 180 days after their filing.[138]

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[117] 5 U.S.C. § 7118(a)(7).

[118] 5 U.S.C. § 7123(b) (1982).

[119] 5 U.S.C. §§ 7123(a), (b).

[120] *See infra* note 193 and accompanying text. *See also* 5 U.S.C. § 7121 (1982).

[121] 5 U.S.C. § 7122(a) (1982).

[122] 5 U.S.C. § 7122(b).

[123] 5 U.S.C. § 7123(a). *See also* Griffith v. FLRA, 842 F.2d 501 (D.C. Cir. 1988) (finding preclusion of even district court review, though leaving open possibility of review of clear violations of statutory authority under Leedom v. Kyne, 358 U.S. 154 (1958) as well as of constitutional claims); Overseas Educ. Ass'n v. FLRA, 824 F.2d 61 (D.C. Cir. 1987) (focusing on the reviewability of FLRA orders involving unfair labor practices). If certain types of discrimination are alleged as the basis for the personnel action, judicial review may be available at the request of the employee.

[124] 92 Stat. 3781 (codified at 3 C.F.R. 321 (1978)), *reprinted in* 5 U.S.C. app. at 1155 (1982).

[125] Civil Service Reform Act of 1978, *supra* note 2.

[126] *See, e.g.*, 5 U.S.C. § 7702 (1982).

There is a right of appeal from the agency to the Office of Review and Appeals (ORA) of the EEOC, which also may remand a complaint to an agency for further investigation or rehearing.[139] The regulations do not specify the scope of ORA review, though it appears to be *de novo* on the record made below. The Commissioners may reopen ORA decisions on their own motion or petition.[140] Corrective action ordered by the ORA or the Commission is "mandatory and binding" on the agency,[141] though the EEOC only has the statutory authority to notify the complainant of his or her right to file a civil action for enforcement of that decision.[142]

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[127] *See* Laponsky, *supra* note 49, at 506 n.21.

[128] 29 C.F.R. § 1613.213 (1988).

[129] 29 C.F.R. § 1613.214.

[130] 29 C.F.R. § 1613.215.

[131] 29 C.F.R. § 1613.216.

[132] 29 C.F.R. § 1613.217(a).

[133] 29 C.F.R. § 1613.217(c).

[134] 29 C.F.R. § 1613.218.

[135] *Id.*

[136] 29 C.F.R. § 1613.218(g).

[137] 29 C.F.R. §§ 1613.218(g), .221.

[138] 29 C.F.R. § 1613.220.

Delays in processing complaints, as well as the completion of various stages in the administrative consideration of a complaint, activate the right to file a civil action in the United States district courts at various specified times.[143] The above description of procedures does not apply to discrimination complaints that move through the negotiated grievance process or those presented in the context of actions appealable to the Merit Systems Review Board. These will be discussed later.[144]

B. Prohibited Personnel Practices

The 1978 Act (supplemented by the Whistleblower Protection Act of 1989[145]) proscribes certain types of conduct that were deemed so inimical to either the merit system or personnel management in general that their discovery and prosecution should be a matter of the gravest importance and result in important sanctions. These are the so-called "prohibited personnel practices."[146] The first

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[139] 29 C.F.R. §§ 1613.231, .234.

[140] 29 C.F.R. § 1613.235.

[141] 29 C.F.R. § 1613.237(a).

[142] 29 C.F.R. § 1613.239(c).

[143] 29 C.F.R. § 1613.281.

[144] *See infra* notes 198-202, 206-10, 218-79 and accompanying text. There are also procedures for class complaints. on which this article does not focus. *See also* 29 C.F.R. §§ 1613.601-.643 (1988).

[145] *Supra* note 95.

[146] 5 U.S.C. § 2302 (1982). Employees with authority to take personnel actions of various types are forbidden in the exercise of that authority to:

> 1. discriminate on the basis of race, color, religion, sex, national origin, age, marital status, political affiliation, or handicapping condition;
>
> 2. solicit or consider recommendations with regard to employees under consideration for a personnel action unless the recommendations are based on first-hand knowledge and are directed to certain matters such as qualifications and character;
>
> 3. coerce the political activity of employees;
>
> 4. deceive any person with respect to the right to compete for employment;

prohibited practice, discrimination on various bases, largely mirrors the type of conduct that is within the EEOC's jurisdiction.[147]

> 5. influence any person to withdraw from competition for a position in order to improve or injure the prospects of another for employment;
>
> 6. grant any preference or advantage not authorized by law to any employee or applicant in order to improve or injure the prospects of any particular person for employment;
>
> 7. engage in nepotism;
>
> 8. take reprisals for "whistleblowing," that is the disclosure of information by an employee who believes that the law is being violated or there has been gross mismanagement, gross waste of public funds, abuse of authority, or a substantial danger to the public;
>
> 9. take reprisals for an employee's exercise of appeal, complaint or grievance rights granted by law or regulation, testimony on behalf of or assistance to an employee in connection with such rights, disclosures to the Special Counsel, or refusing to obey an order requiring violation of the law;
>
> 10. discriminate against any employee or applicant on the basis of conduct that does not adversely affect the performance of the employee or applicant or the performance of others; and
>
> 11. take any other action if it would "violate[ ] any law, rule, or regulation implementing, or directly concerning, the merit system principles."

5 U.S.C. § 2302, as amended by Pub. L. 101-12.

[147] Discrimination on the basis of marital status and political affiliation does not fall under the jurisdiction of the EEOC. Many of the other prohibited personnel practices were a direct response to the scandals that the Civil Service Commission lived through during the early and mid 1970s—and the enormous notoriety of the "Malek manual," which openly advocated "the rape of the merit system."

When Fred Malek was the chief of the Nixon Administration's White House personnel office, he occasioned the drafting of the *Federal Political Personnel Manual*. Frank J. Thompson wrote that "the Malek manual is to personnel administration what Machiavelli's *The Prince* is to the broader field of political science." CLASSICS OF PUBLIC PERSONNEL POLICY 113 (F. Thompson ed. 1979). Malek's infamous manual did not specifically advocate the violation of any law; rather, it encouraged the systematic and widespread abuse of the spirit of the federal merit system. A good way to understand how useful the "Malek manual" was to those who wished to subvert merit selection principles is to read its own "example of the rape of the merit system."

> Let us assume that you have a career opening in your Department's personnel office for a Staff Recruitment Officer. Sitting in front of you is your college roommate from Stanford University in California who was born and raised in San Francisco. He received his law degree from Boalt Hall at the University of California. While studying for the bar he worked at an advertising agency handling newspaper accounts. He also worked as a reporter on the college newspaper. Your personnel experts judge that he could receive an eligibility rating for a GS-11.
>
> The first thing you do is tear up the old job description that goes with that job. You then have a new one written, to be classified at GS-11, describing the duties of that specific Staff Recruitment Officer as directed toward the recruitment of recent law graduates for entry level attorney positions, entry level public information officers for the creative arts and college news liaison sections of your public information shop, and to be responsible for general recruiting for entry level candidates on the West Coast. You follow that by listing your selective

It is treated specially in those parts of the 1978 Act that establish a complex system of interjurisdictional appeals.[148]

The "personnel actions," as to which conduct thus defined is proscribed, include removals for performance or disciplinary reasons, promotions, appointments, transfers, decisions concerning pay, benefits and awards, and "any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level."[149] Positions covered by this part of the statute include, with limited exceptions, any position in the competitive service,[150] career appointees in the Senior Executive Service,[151] and positions in the excepted service.[152]

With regard to enforcement of the prohibitions of Section 2302 of Title 5, several are of particular relevance here. As indicated previously, the Office of Special Counsel has the duty to investigate allegations of prohibited personnel practices and may ask the Merit Systems Protection Board for disciplinary and corrective action.[153] Moreover, agency personnel actions involved in cases coming before the Merit Systems Protection Board, and

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> criteria as follows: Education: BA and LLB, stating that the candidate should have extensive experience and knowledge by reason of employment or residence on the West Coast. Candidate should have attended or be familiar with law schools, and institutions of higher education, preferably on the West Coast. The candidate should also possess some knowledge by reasons of education or experience of the fields of college journalism, advertising, and law.
>
> You then trot this candidate's Application for Federal Employment over to the Civil Service Commission, and shortly thereafter he receives an eligibility rating for a GS-11. Your personnel office then sends over the job descriptions (GS-11) along with the selective criteria which was based on the duties of the job description. When the moment arrives for the panel to "spin the register" you insure that your personnel office sends over two "friendly" bureaucrats. The register is then spun and your candidate will certainly be among the only three who even meet the selective criteria, much less be rated by your two "friendly" panel members as among the "highest qualified" that meet the selection criteria. In short, you write the job description and selective criteria around your candidate's Form 171.
>
> "There is no merit in the merit system!"

White House Personnel Office, "Malek Manual," in Select Committee on Presidential Campaign Activities, Executive Session Hearings, *Watergate and Related Activities: Use of Incumbency—Responsiveness Program*, 93rd Cong., 2nd Sess. (1974). The "Malek manual" is also reprinted in *Classics of Public Personnel Policy*, *infra* at 172-200.

[148] *See infra* notes 198-202, 206-10, 218-79 and accompanying text.

[149] 5 U.S.C. § 2302(a)(2).

[150] *See* 5 U.S.C. § 2302(a)(2)(B). *See infra* note 211.

[151] *See* 5 U.S.C. § 2302(a)(2)(B). *See infra* note 213.

[152] 5 U.S.C. § 2302(a)(2)(B). *See infra* note 212. *But see* 5 U.S.C. § 2302(a)(2)(B)(i), (ii), and (C) for agencies and employees beyond the coverage of the section.

[153] *See supra* notes 95-111 and accompanying text.

before arbitrators exercising authority pursuant to negotiated grievance procedures, cannot be sustained where the agency decision was based on a prohibited personnel practice.[154]

C. A Thematic Overview of the Structure for Considering Employee Complaints, Grievances and Appeals

Although an express purpose of the 1978 Act was to simplify the framework for disposition of employee complaints, grievances, and appeals,[155] the complexity of the new structure is such that an evaluation of the success of the reform efforts in terms of that goal alone would result in a finding of abject failure on the part of Congress. Only close scrutiny of the statutory product discloses that the complexity was created in large part by the simultaneous pursuit of three rather straightforward concerns: adequate protection of employees from discrimination of various types, uniformity in federal personnel management, and solidifying and expanding the place of arbitration as a mechanism to resolve federal employee grievances. Their implementation in the real world of politics demanded a variety of compromises.

First of all, Congress wanted to insure that federal employees could obtain adequate protection against employment discrimination of the types forbidden by federal law in the private sector.[156] As noted above, this suggested that, in 1978, the Equal Employment Opportunity Commission (EEOC) should inherit much of the authority of the Civil Service Commission regarding administration and enforcement.[157] Moreover, bargaining unit employees were given the option of either eschewing the grievance/arbitration process in favor of the statutory processes for considering discrimination claims, or, following resort to the negotiated grievance process, obtaining EEOC review of the arbitration results.[158] Finally, regardless of the non-judicial route initially chosen by the employee, Congress retained a right to a trial *de novo* on discrimination claims in the United States district courts.[159]

Procedurally, the 1978 Civil Service Reform Act insured that, in certain instances, federal employees have not less but more protection than their counterparts in the private sector. Both types of employees may resort to the courts despite the presence and invocation of alternative remedies, whether administrative or arbitral.[160] However, only federal employees have a federal statutory right to both a full trial-type administrative hearing (at the Merit Systems Protection Board (MSPB) with discretionary review of its decision by the EEOC) and a *de novo* hearing in a federal district court where certain types of important personnel actions (such as disciplinary or performance removals) are challenged.[161] Moreover, the EEOC has direct authority to review and reverse various employment actions by agencies and give appropriate remedies to federal employees.[162] In private sector cases, the EEOC may investigate and seek to eliminate an unlawful practice "by informal methods of conference, conciliation, and persuasion."[163] Failing in that endeavor, it must resort to the federal courts to enforce the anti-discrimination statutes.[164] However, parity in the treatment of federal and other employees is not always departed from to the advantage of the federal worker. For example, as noted previously, the EEOC has not been given power to sue on behalf of federal employees.[165]

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[154] 5 U.S.C. § 7701(c)(2)(B) (1982).

[155] *See, e.g.*, 1978 S. Report at 9-10.

[156] *See generally* Reorganization Plan No. 1 of 1978, S. Rep. No. 95-750, 95th Cong. 2d Sess. 6-7 (1978) [hereinafter 1978 SENATE REORGANIZATION REPORT].

[157] *See supra* notes 124-26 and accompanying text.

[158] 5 U.S.C. § 7121(d) (1982).

[159] *But see infra* note 273.

The second concern (though somewhat less aggressively pursued) was uniformity in personnel management. Congress created an Office of Personnel Management that, despite its authority to delegate many of its important functions to agency heads,[166] was vested with overall responsibility for the execution, administration, and enforcement of civil service statutes and rules.[167] Of federal agencies, only the Office of Personnel Management has direct access to the federal courts to overturn an administrative or arbitral order in a personnel case. This access, however, is limited to instances where the administrative or arbitral decision involves an error in the interpretation of civil service law that may have system-wide impact.[168]

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[160] *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); 5 U.S.C. § 7702 (1982).

[161] *See infra* notes 198-202, 206-10 and accompanying text.

[162] *See, e.g.*, 29 C.F.R. §§ 1613.237-.239 (1988).

[163] 42 U.S.C. § 2000e-5(b) (1982).

[164] 42 U.S.C. § 2000e-5(f)(1).

[165] *See supra* note 142 and accompanying text.

[166] *See* 5 U.S.C. § 1104(a) (1982).

[167] 5 U.S.C. §§ 1103(a)(5), 1104(b)-(c).

[168] 5 U.S.C. § 7703(d) (1982).

The MSPB's independence was intended to guard against future politicization of the civil service and to counterbalance the increased discretion given federal managers and political appointees regarding personnel actions.[169] For the principal performance-based and disciplinary actions against federal employees, there was a right (limited to certain employees) to appeal to the MSPB.[170] This access was assured even where a collective bargaining agreement established a grievance/arbitration process to cover those types of actions.[171] Furthermore, with regard to these cases, Congress expressly mandated certain procedural uniformity between the MSPB and the negotiated grievance process[172] and seems to have intended that the same substantive rules apply in both fora, with the apparent expectation that the Board would hold the laboring oar in establishing the governing principles.[173] In 1978, regional court of appeals review of the MSPB and arbitration decisions was seen as an adequate mechanism in enforcing uniformity of treatment of the major personnel actions.[174] This goal was further assured through the creation in 1982 of the Federal Circuit vested with exclusive jurisdiction to review both MSPB and arbitral decisions in the principal performance and disciplinary cases outside the discrimination context.[175]

In short, the mandated procedural and substantive uniformity in treatment of important personnel actions, vesting the Office of Personnel Management with the right to request judicial review in cases of system-wide importance, along with the creation of the Federal Circuit, represented in part Congress' attempt to assure some degree of unity in personnel management. Such uniformity would reduce potential confusion by managers regarding limits on their discretion and distinctions in the legal treatment of employees subject to personnel actions, both of which might flow from the ability of some (but not all) employees to forum shop for favorable law.

The pursuit of uniformity proved to be a particular challenge in the case of those major performance and disciplinary actions appealable to the MSPB also involving allegations of discrimination. These are known as mixed cases. The difficulty that they posed in 1978 and continue to create resides in the impossibility of always clearly separating pure "personnel law" issues from issues of discrimination.[176] While the House in 1978 proposed giving the EEOC ultimate authority in these matters, the Senate feared that such a solution would severely weaken the newly-established MSPB by suggesting it was not to be trusted to fully protect employee rights under the anti-discrimination statutes.[177] The Senate also emphasized the need for consolidated treatment of mixed cases given the nature of the issues they presented and to avoid inconsistent decisions in similar matters.[178] The solution devised to address these problems was to give the MSPB initial administrative jurisdiction (including appellate jurisdiction over mixed cases moving from the negotiated grievance process), to give the EEOC the right to review MSPB decisions from the point of view of discrimination law, and to refer disputes between the agencies to a Special Panel composed of three members (an outsider, a Board member, and an EEOC Commissioner).[179]

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[169] *See* 1978 SENATE REORGANIZATION REPORT, *supra* note 156, at 11.

[170] *See* 5 U.S.C. §§ 4303(e), 7513(d) (1982).

[171] *See* 5 U.S.C. § 7121(e)(1) (1982).

[172] 5 U.S.C. § 7121(e)(2).

[173] *See infra* notes 397-400, 414-16 and accompanying text.

[174] *See* 1978 S. REPORT, *supra* note 70, at 52, 63, 111.

[175] *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified at 5 U.S.C. § 7703 (1988)).

This attempt to create unified treatment of the legal and factual issues of mixed cases stopped at the administrative border, however. Congress' decision to retain the right to a trial *de novo* in the district courts in mixed cases, following exhaustion of the administrative remedies, meant that the regional circuits would be confronted with issues of personnel law even after the creation of the Federal Circuit in 1982.[180] Moreover, the government's ability to obtain direct judicial review of personnel law issues at its request was severely limited—and nonexistent in some cases—where alleged discrimination formed part of an employee's claim. This situation, in conjunction with the statutory rights of employees to choose among several appeal routes—both in mixed and pure discrimination cases—almost guaranteed that different legal rules might be applied in the various adjudicatory fora.[181]

The goal of uniformity in personnel administration was compromised further by the third congressional concern: the desire to provide a firm statutory basis for, and expand the role of, collectively-bargained grievance processes in federal work-place dispute resolutions. Congress expressly sanctioned a broad scope for these processes, which included major performance and disciplinary actions as well as discrimination claims (though granting the employee the option to eschew these processes for the MSPB and the EEOC).[182] While appeal from arbitrator decisions in performance and disciplinary actions generally lay in the courts of appeal and (after 1982) in the Federal Circuit, other arbitration awards were to be reviewed solely by the new Federal Labor Relations Authority, whose decision was final absent an unfair labor practice or discrimination.

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[176] *See infra* notes 220-24 and accompanying text.

[177] *See* 1978 SENATE REORGANIZATION REPORT, *supra* note 156, at 11.

[178] *Id.* at 11-13.

[179] *See infra* notes 227-55 and accompanying text.

[180] *See infra* notes 271-79 and accompanying text.

[181] *See infra* notes 579-81 and accompanying text.

Thus, several aspects of the statute tolerated disuniformity. In the case of the major performance and disciplinary actions, despite the express statutory requirement for some procedural uniformity and the implicit suggestion for uniformity in terms of the substantive rules applied, the informal nature of the arbitral process—including the lack of the type of procedural opportunities available in a judicialized process and its function as an extension of the collective bargaining process—practically guaranteed that the results in MSPB and arbitral cases would differ.[183] Moreover, the Federal Circuit has tempered its approach to arbitration awards with much the same type of deference paid by courts reviewing arbitral awards in the private sector.[184] This deference is also observed by the MSPB and the EEOC when reviewing the results of the arbitral process in discrimination cases.[185]

Finally, regarding those arbitral awards where it has the final say, the Federal Labor Relations Authority has not deemed itself bound to MSPB precedent where similar legal issues arise, though it does take MSPB decisions into account in making its own determinations.[186] Inconsistencies in the approach to personnel law have resulted, though to date they have been relatively minor.[187]

The statutory structures created in 1978 and elaborated upon by agency regulation create a Byzantine maze of appellate routes.

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[182] *See* 5 U.S.C. § 7121(d)-(e).

[183] *See infra* notes 401-12 and accompanying text.

[184] *See infra* notes 422-23 and accompanying text.

[185] *See, e.g.*, Carr v. Dep't. of the Air Force, 32 MSPB 665 (1987); Robinson v. Dep't. of Health & Human Services, 30 MSPB 389 (1986); and Denson v. Veteran's Admin., 30 MSPB 383 (1986).

[186] *See infra* note 460 and accompanying text.

[187] *See infra* notes 461-63 and accompanying text.

The by-products have been delay in final resolution of cases, confusion for managers, employees, and even the agencies responsible for administering the various processes, and more than a little cynicism regarding the statutory product. While these and other concerns suggest that structural reform should be considered—even if it only clears away part of the complexity—such reform cannot be divorced entirely from judgments regarding past performance of the entities vested with the responsibility for administering these processes. To take perhaps the principal example of this, while most federal employees have the option to use the negotiated grievance process to contest the major performance and disciplinary actions, the MSPB appears to remain the adjudicatory "cornerstone" of the procedural reforms of 1978 in terms of its share of the docket load of these types of cases, even where discrimination is alleged.[188] The ability to eliminate some of the complexity is, therefore, dependent upon the Board's performance in its role as independent adjudicator and the perceptions regarding its performance.[189]

D. *Roadmap for the Uninitiated (Also Perhaps Helpful for the Expert)*

A brief summary of the complaint, grievance and appellate structure will assist those who are making their first acquaintance with this subject. It may even benefit those who deal with the system on a regular basis. At the same time, bearing in mind that simplicity of description can mislead in some respects, the following should appropriately be accompanied by a Surgeon General-type warning: "Taking this summary without a few grains of salt may be dangerous to your health."

For the purposes of the discussion, the following background notes and definitions are necessary:

1. "Discrimination" refers to discrimination on the basis of race, color, religion, sex, national origin, age, and handicapping condition.

2. "Chapter 75 action" refers to a removal, suspension for more than 14 days, reduction in pay or grade, or furlough for 30 days or less [with regard to certain covered employees] *based on "the efficiency of the service."*[190]

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[188] *See infra* notes 384-92 and accompanying text.

[189] *See infra* notes 431-39 and accompanying text.

[190] 5 U.S.C. §§ 7512, 7513 (1982).

3. "Chapter 43 action" refers to a removal or reduction in grade [of certain covered employees] *based on "unacceptable performance."*[191]

4. Prior to taking final action against an employee under Chapters 43 or 75, the agency must generally provide notice of the proposed action and some opportunity for response by the employee.[192]

5. "Mixed cases" are those involving actions which are of the type appealable to the Merit Systems Protection Board and where discrimination is alleged as having been a basis for the action.

6. "Negotiated grievance procedure" (NGP) is the process established by collective bargaining agreement which incorporates the opportunity for the employee, union and agency to first resolve a controversy informally and, following an adverse agency decision on the grievance, submission *by the union* (*not at the sole request of the employee*) or agency of the dispute to binding arbitration.[193]

7. "Agency administrative grievance system" is the internal agency process for considering employee complaints which do not fall within an NGP[194] and which are not subject to other statutory or regulatory appellate and complaint systems (e.g., EEO complaints and MSPB appeals).[195] Certain types of employees[196] and certain types of employment actions[197] are, however, exempt from coverage by these systems whose design is subject to OPM regulation.

EMPLOYEES NOT WITHIN BARGAINING UNITS OR ACTIONS EXCLUDED FROM THE SCOPE OF A NEGOTIATED GRIEVANCE PROCEDURE

Actions not involving alleged discrimination (Chart 1).

a. Chapters 43 and 75 actions (along with other matters within MSPB subject matter jurisdiction such as reductions-in-force) are adjudicated by the MSPB with the right of appeal to the Federal Circuit.

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[191] 5 U.S.C. § 4303.

[192] 5 U.S.C. §§ 4303(b), 7513(b).

[193] 5 U.S.C. § 7121.

[194] 5 C.F.R. § 771.204 (1988).

[195] 5 C.F.R. § 771.206(c)(1)(ii).

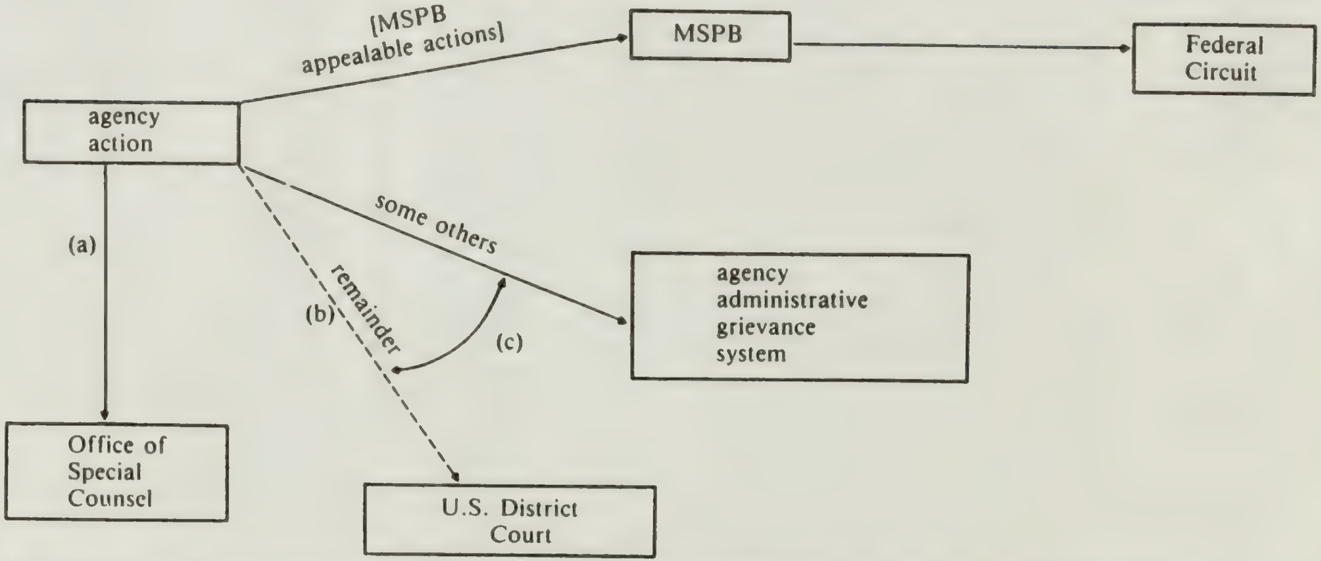
[196] 5 C.F.R. § 771.206(b).

[197] 5 C.F.R. § 771.206(c).

b. Other actions (e.g., award decisions and some removals of excepted service employees) *may* fall within the scope of agency administrative grievance systems. If not, no administrative remedies are available other than resort to the Office of Special Counsel.

CHART 1

EMPLOYEES NOT WITHIN BARGAINING UNITS DISCRIMINATION NOT ALLEGED


agency action
[MSPB appealable actions]
MSPB
Federal Circuit
some others
agency administrative grievance system
(a)
Office of Special Counsel
(b)
remainder
(c)
U.S. District Court

(a) Limited to cases alleging prohibited personnel practices or other violations of civil service law. OSC investigates and may prosecute cases before MSPB.

(b) Implied rights of action for statutory and constitutional violations. These rights of action might be available to employees covered by any of the following charts, but for simplicity sake they are not referred to in those charts.

(c) There is (or maybe) a choice of going both routes.

Actions involving allegations of discrimination (Chart 2).

a. Chapters 43 and 75 actions (and other MSPB appealable actions) are adjudicated by the MSPB with the option to initially process these through a modified EEO process (the "mixed complaint" process[198]) within the agency (with no right to a hearing before an EEOC administrative judge prior to the agency decision[199]) and with potential review of the MSPB decision on matters of discrimination law by the EEOC and a Special Panel[200] where the MSPB and EEOC differ.

b. Other actions not appealable to the MSPB (e.g., promotion decisions) fall within the EEO process which includes initial agency counseling, investigation, hearing, recommended and final decision and appeal to EEOC's Office of Review and Appeals.[201]

c. Following exhaustion of administrative remedies, there is a right of the employee to a *de novo* proceeding on the discrimination issues in federal district court. No Federal Circuit review is available at the employee's request if a discrimination issue remains in the case after any MSPB review.[202]

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[198] *See* 29 C.F.R. § 1613.401-.421 (1988).

[199] 29 C.F.R. § 1613.405(e). With the issuance of the agency decision, the employee has the choice of suing immediately in federal district court on the discrimination claim or asking for a hearing at the MSPB. *See* 5 U.S.C. § 7702(a)(2) (1988).

[200] *See infra* notes 227-35 and accompanying text.

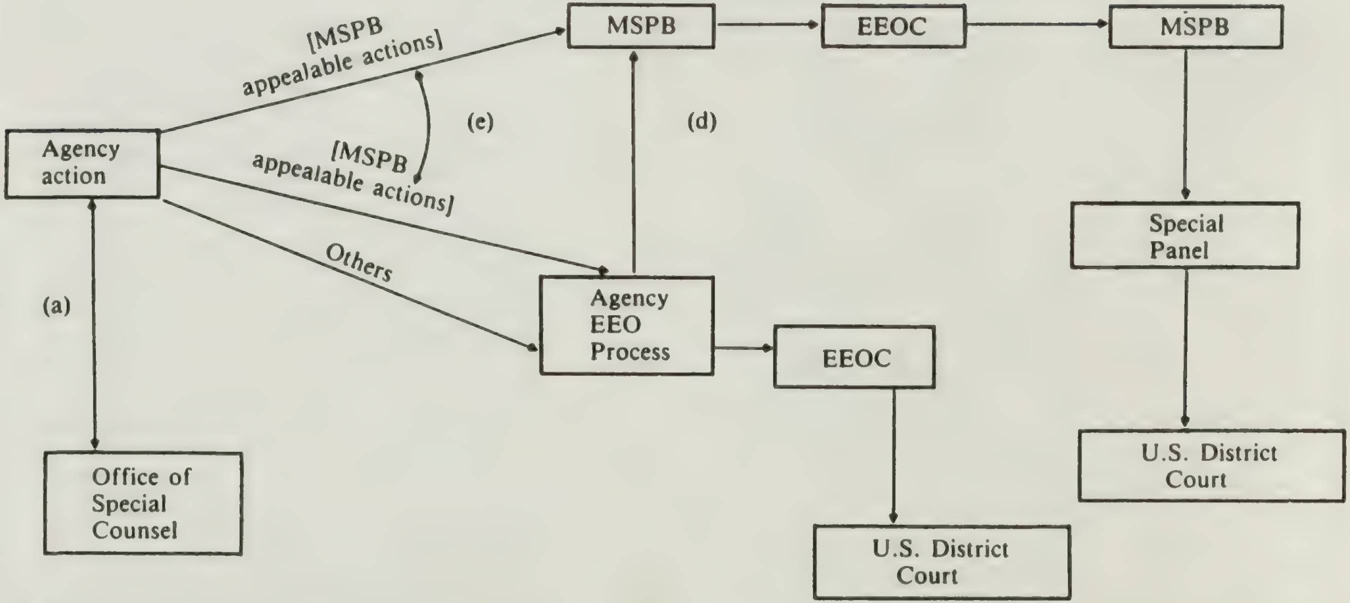
[201] *See supra* note 198.

That an employee's choices turn on the "MSPB appealability" of the underlying action raises the specter of a ping-pong match between the MSPB and the EEOC which could consume considerable agency and employee resources and time. The employee might file in the ordinary EEO process without regard to the MSPB appealability of his or her matter, only to be eventually told by the EEOC to start again before the MSPB. Conversely, the employee might file in the MSPB process and later find out that the underlying action was not appealable and the ordinary EEO process was the only route available. (These prospects assume filing deadlines are tolled in such instances.) These scenarios have in fact occurred, *see, e.g.*, *infra* note 262, though their frequency is not documented statistically. Since outside the area of constructive discharge, the MSPB appealability of an action is generally clear as a legal matter, misfiling and/or incorrect processing would generally be attributable to employee or agency mistake. Whenever the differing jurisdictional prerequisites for several appeal routes make each the exclusive one for matters within their particular coverage, such confusion may arise.

[202] *See infra* notes 277-78 and accompanying text.

CHART 2

EMPLOYEES NOT WITHIN BARGAINING UNITS
DISCRIMINATION ALLEGED


Agency action
[MSPB appealable actions]
[MSPB appealable actions]
Others
(a)
(e)
(d)
Office of Special Counsel
MSPB
EEOC
MSPB
Agency EEO Process
EEOC
Special Panel
U.S. District Court
U.S. District Court

(d) Where MSPB appealable action is taken through EEO process, no hearing at agency level is provided. Following agency decision, employee may opt for a hearing at the MSPB or sue directly in District Court.

(e) There is a choice of going either route.

EMPLOYEES WITHIN BARGAINING UNITS WHERE THE NEGOTIATED GRIEVANCE PROCEDURE COVERS THE ACTION AT ISSUE[203]

Discrimination not alleged (Chart 3).

a. Chapters 43 and 75 actions may, at option of employee, be adjudicated by the MSPB with appeal to the Federal Circuit *or* processed through the negotiated grievance procedure, which includes arbitration at the option of the union and appeal of right by the employee to the Federal Circuit.[204]

b. Other actions (e.g., within-grade denials) fall exclusively within the jurisdiction of the negotiated grievance process with a right of appeal to the FLRA but not judicial review of its decision unless an unfair labor practice is involved.[205]

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[203] It is always possible, of course, that a personnel action, such as a removal, might be animated by anti-union animus or otherwise have the characteristics of an unfair labor practice as defined by the statute. Where there is a statutory appeals procedure available—as in the case of a Chapter 43 or 75 removal even where such an action may fall within the scope of an NGP—the matter may not be raised before the FLRA through the unfair labor practice proceedings. Rather the statutory procedure or, where applicable, the negotiated procedure are the only routes available. Where a statutory appeals procedure is not available (as where the personnel action at issue is not taken under the authority of Chapter 43 or 75 and no discrimination of the type within EEOC jurisdiction is alleged) an employee has the option of pursuing matters through the NGP or the FLRA procedures for remedying unfair labor practices, but not both. *See* 5 U.S.C. § 7116(d) (1988).

In Bodinus v. Dep't of the Treasury, 7 M.S.P.B. 385 (1981), the Board held that while it did not have jurisdiction over unfair labor practices so called, it could consider evidence of anti-union animus as proof of some prohibited personnel practices. In construing the word "matter" found in Section 7121(d) (which is also found in Section 7116(d)), the Authority has held that it refers to the personnel action involved, not the "issue" of discrimination. *See* U.S. Department of Justice, United States Marshalls Service and International Council of U.S. Marshalls Service Locals, AFGE, 23 F.L.R.A. No. 78 (1986).

Since agency actions cannot be sustained before the MSPB if "not in accordance with law," *see* 5 U.S.C. § 7701(c)(2)(C) (1988), and since "grievances" which may be covered by an NGP include "any claimed violation . . . of any law," 5 U.S.C. §§ 7701(c)(2)(C), 7103(a)(9)(C)(ii), an employee would appear to have available (absent a bargaining agreement to the contrary) as defensive matters whatever he or she could raise in an unfair labor practice proceeding on the argument that conduct constituting an "unfair labor practice" is by virtue of Section 7116 contrary to law.

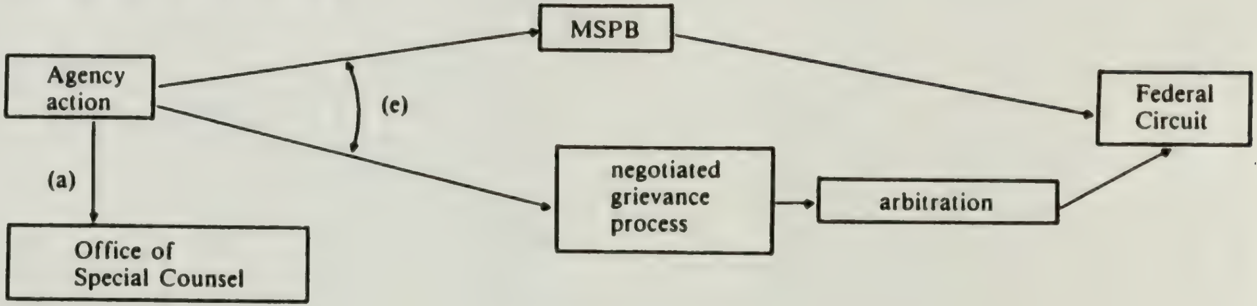
[204] *See* 5 U.S.C. § 7121(e), (f) (1988).

[205] *See* 5 U.S.C. § 7123.

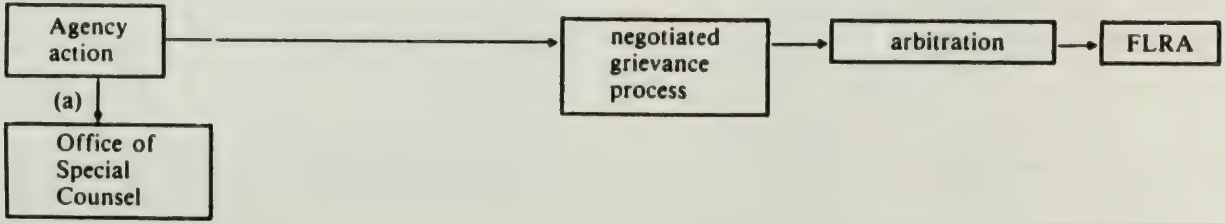
CHART 3

EMPLOYEES WITHIN BARGAINING UNITS
DISCRIMINATION NOT ALLEGED

I. CHAPTER 43 AND 75 ACTIONS


Agency action
(a)
Office of Special Counsel
(e)
MSPB
negotiated grievance process
arbitration
Federal Circuit

II. OTHERS


Agency action
(a)
Office of Special Counsel
negotiated grievance process
arbitration
FLRA

Discrimination is alleged (Chart 4).

a. Chapters 43 and 75 actions may, at option of employee, be adjudicated by the MSPB *or* processed through the negotiated grievance procedure.[206]

1. Where the former (MSPB) is chosen, the employee may opt immediately for MSPB review or have his or her charge processed initially through the agency in a modified EEO procedure (the "mixed complaint" process) with the hearing after the agency decision at the MSPB. Following an MSPB decision, there may be EEOC and Special Panel review.

2. Where the latter (NGP) is chosen, the MSPB, the EEOC and Special Panel may review the arbitrator's resolution of the discrimination issue, though the MSPB restricts the scope of its review to matters of legal interpretation and not fact finding.[207]

3. Any judicial review of the administrative or arbitral determinations takes place not in the Federal Circuit but in the district

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[206] *See* 5 U.S.C. § 7121(d).

[207] *See, e.g.*, Carr v. Dep't of Air Force, 32 M.S.P.B. 665 (1987); Robinson v. Dep't of Health and Human Services, 30 M.S.P.B. 389 (1986). Section 7121(d) of the statute speaks of MSPB "review" and this was, in part, the basis for the Board's decision regarding the scope of its examination.

The Board reviews the entire case, not just the allegations of discrimination and in doing so relies on Board precedent at least if the underlying action is a Chapter 43 or 75 matter. *See Robinson*, 30 M.S.P.B. 389.

Cases coming to the Board from the NGP may include Chapters 43 and 75 actions where FLRA review is not available so the last step before Board review will be arbitration. In other instances there may be an FLRA order. The *Robinson* case involved a Chapter 43 action where there is statutory option to proceed initially via the NGP or appeal to the MSPB. It was in this context that the Board held that it would rely on Board precedent, basing its reasoning on the statutory mandate of some uniformity between arbitration and Board proceedings in Chapter 43 matters. *See infra* notes 396-412 and accompanying text. Since the presence of alleged discrimination allows employees the initial choice of the statutory routes over the NGP for MSPB appealable actions even when Chapters 43 and 75 are not involved, the Board might rely on the need to avoid forum shopping to justify the application of Board precedent in all mixed cases coming from the arbitral process. Of course, because of the lack of *de novo* review of the arbitral award, forum shopping between the NGP and the statutory appeal process, instead of being motivated by differing bodies of "law," might instead be motivated by differing scopes of MSPB review. In mixed cases coming to the Board from the statutory route, the Board conducts a de novo review. (Some of the holdings of *Robinson* may need some modification where the MSPB gets the case following FLRA review.)

Appellants are not required to submit a transcript or verbatim record of the arbitration hearing with the request for review. *See* Denson v. Veterans Admin., 30 M.S.P.B. 383 (1986). *Denson* rejected the contention that lack of a transcript or tapes of the arbitration hearing entitled the appellant to a new hearing before the Board. The record thus submitted is similar to that used by the FLRA in reviewing arbitration awards. It is an interesting question whether the Board should, in the case of a mixed appeal from the FLRA, see itself as reviewing the FLRA's review of the arbitrator or as taking some other stance.

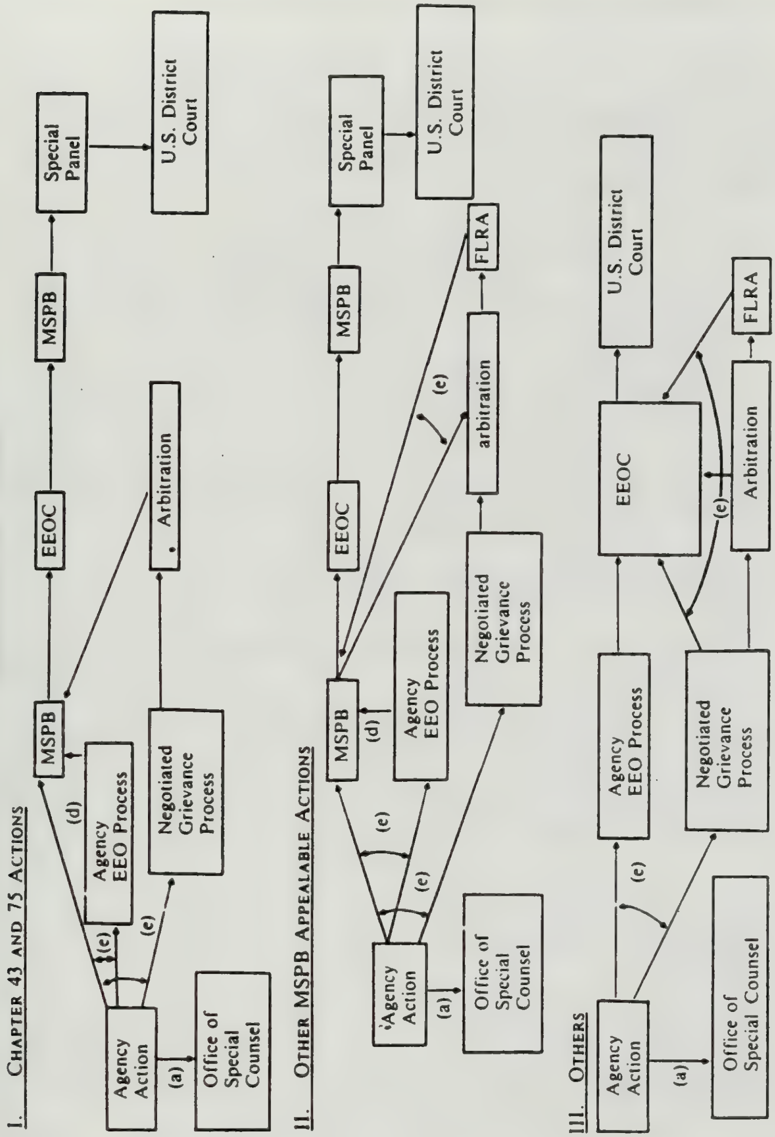
court in a *de novo* proceeding on the discrimination issues and an administrative record review on the personnel side.[208]

b. Actions (other than those under Chapters 43 and 75) of the type which are within the jurisdiction of the MSPB (e.g., reductions-in-force) but fall within the scope of the negotiated grievance process are treated like Chapters 43 and 75 actions with the exception that if the negotiated grievance process is chosen, FLRA review of the arbitral award is available before any MSPB/EEOC/ Special Panel review.

c. Actions which are not of the type appealable to the MSPB (e.g., promotion decisions) may, at the option of the employee, be processed through the ordinary EEO process with appeal of any agency decision to the EEOC Office of Review and Appeals.[209] Alternatively, they may be processed through the negotiated grievance procedure with the opportunity to have the FLRA and EEOC review any arbitral award though that review is restricted largely to matters of legal interpretation.[210] Following this there is a right (though disputed by some agencies) of the employee to a *de novo* proceeding in the district court regarding the discrimination issue.

CHART 4

EMPLOYEES WITHIN BARGAINING UNITS
DISCRIMINATION ALLEGED


I. CHAPTER 43 AND 75 ACTIONS
Agency Action
(a)
Office of Special Counsel
(e)
(e)
Agency EEO Process
(d)
MSPB
Negotiated Grievance Process
Arbitration
EEOC
MSPB
Special Panel
U.S. District Court
II. OTHER MSPB APPEALABLE ACTIONS
Agency Action
(a)
Office of Special Counsel
(e)
(e)
Agency EEO Process
(d)
MSPB
Negotiated Grievance Process
EEOC
arbitration
(e)
MSPB
FLRA
Special Panel
U.S. District Court
III. OTHERS
Agency Action
(a)
Office of Special Counsel
(e)
Agency EEO Process
Negotiated Grievance Process
EEOC
(e)
Arbitration
FLRA
U.S. District Court

E. *A Note on the Scope of Procedural Protections*

The Civil Service Reform Act of 1978 followed the prior historical pattern of modulating the scope of the statutorily-guaranteed procedural protection accorded federal employees (both before and after the employing agency's decision to take a personnel action) according to:

> 1. the employee's position (e.g., competitive service,[211] excepted service,[212] or senior executive service[213]);
> 2. the characteristic of the incumbent (e.g., veteran[214] or probationer[215]); and
> 3. the type of personnel action (e.g., removal[216] or suspension for fourteen days or less[217]).

Generally, non-probationary competitive service employees and veterans in the excepted service receive the greatest degree of pre-action and post-action protection.

F. *The Special Problem of the Mixed Case*

In addressing actions alleging discrimination which would, absent that element, fall within the MSPB's jurisdiction, the House and Senate versions of the 1978 legislation differed substantially. The House bill allowed the EEOC to delegate to the MSPB authority to make a preliminary determination in an adverse action raising discrimination issues, but it directed the EEOC to make the final determination.[218] The statute, as enacted, largely adopted the Senate version,[219] an approach dictated by the character of most mixed actions.

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[211] *See* 5 U.S.C. § 4303(e) (1982) (MSPB appeal rights of competitive service employees in Chapter 43 actions).

[212] *See* 5 U.S.C. § 7511(a)(1)(B) (1982) (non-preference excepted service employees not covered by Chapter 75 procedures). *See also* Dep't of Treasury v. FLRA, 873 F.2d 1467 (D.C. Cir. 1989); U.S. Dep't. of Health & Human Services v. FLRA, 858 F.2d 1278 (7th Cir. 1988) (the negotiated grievance process may not be extended to cover discharge under Chapters 43 or 75 of bargaining unit, non-preference excepted service employees).

[213] *See* 5 U.S.C. §§ 7541-7543 (protections relating to removal of career SES employees).

[214] *See* 5 U.S.C. § 7511(a)(1)(B) (preference eligibles in excepted service protected by Chapter 75 procedures).

[215] *See* 5 U.S.C. § 4303(f)(2) (probationary employees in competitive service positions excepted from Chapter 43 procedural protections).

[216] *See, e.g.*, 5 U.S.C. §§ 7512-7513.

[217] *See, e.g.*, 5 U.S.C. §§ 7501-7504 (suspensions for 14 days or less).

[218] *See* Civil Service Reform Act of 1978, Report of the Committee on Post Office and Civil Service, H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 4 (1978).

The Senate report explained:

> In [personnel cases involving issues of discrimination law and pure personnel law] questions of the employee's inefficiency or misconduct, and discrimination by the employer, will be two sides of the same question which must be considered together. Any provision denying the Board jurisdiction to decide certain adverse action appeals because discrimination is raised as an issue would make it impossible for the government to have a single unified personnel policy which took into account the requirements of all the various laws and goals governing Federal personnel management. In the absence of full Board jurisdiction, forum shopping and inconsistent decisions, perhaps arising out of the same set of facts, would result.[220]

To create a system whereby an employee could successfully protest his or her removal to the EEOC on discrimination grounds and yet could lose before the Board when it considered only the performance aspects of the case would hardly have represented reform in a meaningful sense. But the problem of mixed cases is broader than this.

A simple example may help to bring this point home. Assume an employee is removed under Chapter 43 for allegedly inadequate performance. He or she argues that the real motivation behind the firing was racial discrimination. If the agency's proof of inadequate performance is particularly weak, the designated fact-finder reviewing the agency action permissibly could rely on this very weakness to suggest the presence of a discriminatory motive. This is analogous to the way a Title VII action is tried in the district courts. Following the plaintiff's prima facie case, the burden shifts to the government to articulate a legitimate reason for the firing; if the government fails, then the plaintiff prevails on the discrimination issue.[221] In short, an adequate assessment of a personnel action allegedly involving discrimination requires a consideration of all the factual evidence if the goals of personnel and discrimination law are to be achieved.

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[219] *See* Civil Service Reform Act of 1978, CONFERENCE REPORT, H.R. No. 95-1717, 95th Cong., 2d Sess. 139 (1978) [hereinafter 1978 CONFERENCE REPORT].

[220] *See* 1978 S. REPORT, *supra* note 70, at 53.

[221] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

However, it is not just at the factual level that mixed cases defy neat segregation into "personnel law" aspects and "discrimination" law aspects. This problem also appears at the level of legal doctrine. While in the abstract it might be easy in some cases to identify a particular statute or regulation as one of the "civil service" regime and another as one occupying the regime of "discrimination law," the actual interrelationship of the two bodies of law has hardly been comprehensively thought out by Congress. How are these two bodies of law to fit together? For example, in the handicap area, to what extent does the duty of "reasonable accommodation" cut into the discretion or lack thereof possessed by agency managers under "civil service" rules in choosing and structuring the nature of the work force under their control?[222]

This legal inseparability of mixed cases is particularly important from a "political" point of view. Since the meshing of discrimination statutes and civil service rules is largely a policy-making exercise, little constrained by express or conscious congressional design, the orientation of the entity having the last (or almost the last) word is of particular importance. To the extent that the EEOC was seen as insensitive to personnel management considerations, resistance to vesting final administrative control there in 1978 was to be expected. To the extent the MSPB was feared to be more "management oriented" or less concerned by nature with equal employment opportunity goals, opposition to MSPB control was a foregone conclusion. This was particularly true given MSPB's position as the inheritor of part of the authority of the former Civil Service Commission, which was not viewed as overly aggressive in the discrimination sphere.[223]

The Senate response to these tensions, a response that laid the foundation for the ultimate legislative compromise, was to create an administrative structure that would assure that:

> [N]either the Merit Systems Protection Board, nor the Equal Employment Opportunity Commission, will be able to overrule the other. Instead, the powers of the Board and the Commission are carefully balanced one against the other. The committee felt that it was absolutely essential to the success of the overall civil service reform effort that there be this creative balance between

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[222] *See* 29 C.F.R. § 1613.704 (1988).

[223] *See* Final Staff Report, *supra* note 63, at 237.

> the authority of the Board and the Commission because of the unique nature of the issues involved.[224]

Given this explanation for the background for the Special Panel procedures (Section 7702 of Title 5), the "uniqueness" of the resulting administrative scheme comes as no surprise.[225]

1. *The Statutory Provisions*

Mixed cases are funnelled to the MSPB prior to EEOC decisional involvement on the merits. If the case proceeds through the agency in the EEOC mixed complaint process, the agency must issue its decision within 120 days, but there is no requirement of appeal to the MSPB prior to filing a civil action in district court.[226] If the action is filed initially with the MSPB, the MSPB must decide the case within 120 days.[227]

Following a final MSPB decision, the employee may (but need not) petition the EEOC to consider the MSPB's decision.[228] If the EEOC accepts the petition, it may supplement the record.[229] In any event, within sixty days of its acceptance, it must either concur in the MSPB's decision or issue another decision differing from the MSPB's to the extent that the EEOC finds that the MSPB decision constitutes an incorrect interpretation of the discrimination statutes administered by the EEOC or that the MSPB decision involving such statutes is not supported by the record.[230] If the EEOC does not concur, it must refer the matter to the MSPB, which, within thirty days, must either concur in the decision of the EEOC or find that that decision constitutes an incorrect interpretation of civil service law or is not, as to such law, supported by the record.[231] If the MSPB does not concur, it must reaffirm its initial decision, with appropriate revisions.[232] Such a reaffirm-ance by the MSPB results in mandatory certification of the matter to a Special Panel comprised of one EEOC member, one MSPB member, and a chairperson (an outsider), appointed by the President with the advice and consent of the Senate.[233] This Special Panel is to review the record and decide the issues in dispute within forty-five days of the certification.[234] It must "give due deference to the respective expertise of the Board and the Commission in making its decision."[235]

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[224] 1978 S. Report, *supra* note 70, at 52-53. *See also* 1978 Conference Report, *supra* note 219, at 139.

[225] *See generally* McCubbins, Noll & Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. Econ. & Org. 243, 255 (1987) ("[T]he coalition that forms to create an agency . . . will seek to ensure that the bargain struck among the members of the coalition will not unravel once the coalition disbands").

[226] 5 U.S.C. § 7702(a)(2) (1982).

[227] 5 U.S.C. § 7702(a)(1).

[228] 5 U.S.C. § 7702(b)(1).

[229] 5 U.S.C. § 7702(b)(4).

[230] 5 U.S.C. § 7702(b)(3)(A), (B).

[231] 5 U.S.C. § 7702(b)(5), (c).

[232] 5 U.S.C. § 7702(c)(2).

The statutory provisions described above seem to draw a rabbit out of the hat. How can an EEOC decision constitute an incorrect interpretation of civil service law when a case is referred to the commission for its views on the meaning or applicability of discrimination law? The explanation is, of course, the close relationship between civil service law and discrimination law and their inseparability in many cases.

In this complicated fashion, EEOC involvement was insured as a hedge against the possibility that the MSPB might not be a sympathetic forum for discrimination claims on the facts or that the MSPB might fail to give appropriate consideration to discrimination law in its legal interpretations.

2. *The Special Panel in Practice*

To date, there have been only three Special Panel proceedings, none of which resulted from a case processed through the negotiated grievance procedure.

Seven years after the enactment of the 1978 Civil Service Reform Act, the first certification to the Special Panel occurred. The case, *Ignacio v. United States Postal Service*,[236] involved the removal of an employee for unfitness for duty as a letter carrier. The dispute between the MSPB and the EEOC centered on an issue of law, not fact: whether an agency was required to consider reassignment of a handicapped employee as part of the "reasonable accommodation" to which the employee was entitled by law. In its final decision,[237] the Special Panel accepted the EEOC's affirmative resolution of this question, and no further discussion of the merits is necessary here. Rather, *Ignacio* is important to this study since, as the first proceeding of its type, the Panel felt obliged to construe Section 7702 and define (or create) various procedures to be applied in future Panel proceedings.[238] In this regard, it would appear that complication breeds complication, for the rules adhered to by the majority of the Panel depart substantially from what a simple-minded (though not for that reason incorrect) reading of the statute suggests—"decide the issues [i.e., the merits] in dispute [one way or another] and issue a final decision"[239] in accordance with that determination.

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[233] 5 U.S.C. § 7702(d)(1), (6).

[234] 5 U.S.C. § 7702(d)(2)(A).

[235] 5 U.S.C. § 7702(d)(2)(B).

[236] 28 M.S.P.R. 337 (Spec. Pan. 1985).

[237] 30 M.S.P.R. 471 (Spec. Pan. 1986).

Since a dispositive treatment of the "law of the Special Panel" is not appropriate here, a brief summary of the rules established by the *Ignacio* majority is sufficient. The apparent purpose of the rules is to extricate the Special Panel from deciding the merits of the issues presented regarding civil service law and discrimination law unless it is absolutely necessary. This approach is curious, to say the least, in view of the congressional history behind the legislative compromise. Accordingly, the Special Panel will:

> 1. accept the EEOC's decision if the MSPB was wrong in its conclusion that the EEOC had misinterpreted civil service law and the EEOC's conclusion that the MSPB misinterpreted discrimination law is reasonable;
> 2. accept the MSPB decision on reference back from the EEOC where the MSPB was correct in its finding that the EEOC misinterpreted civil service law and the EEOC was "unreasonable" in its determination that the MSPB was incorrect in construing discrimination law; and
> 3. decide the "merits" of the case only where the MSPB was correct in its decision regarding EEOC's misreading of civil service law and the EEOC was correct in its finding that the MSPB was wrong on the discrimination law issue.
> 4. ask if the EEOC based its decision on civil service law "as the necessary premise for its conclusion" in determining whether the MSPB was correct in finding that the EEOC decision "constituted" an incorrect interpretation of civil service law.[240]

The Panel found that the MSPB was wrong in finding that the EEOC decision constituted an incorrect reading of civil service law (thereby resulting in an acceptance of the EEOC decision).[241] A wag might observe that the first Special Panel thereby established that it should never have been empaneled to begin with and the weight of its decision should be determined accordingly.

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[238] *Id.* at 483.

[239] 5 U.S.C. § 7702(d)(2)(A)(1979). This more straightforward approach seems to be the one that was advocated by the Chairman of the Panel, Herbert E. Ellingwood. *See* 30 MSPR 487-491.

[240] 30 M.S.P.R. at 483-86.

A close reading of the *Ignacio* rules discloses that they basically demand a reexamination of the required statutory findings that are conditions precedent to certification to the Panel. According to the *Ignacio* Panel, the rules are designed "to prevent either agency from forcing a Special Panel review on the merits of issues in the other agency's area of primary expertise without a sufficient basis to do so."[242] In other words, the underlying assumption is that if an agency cannot by itself have the authority to resolve all issues according to its own views, it will opt for a decision by a special body where it at least has some input by virtue of its membership. The role of the Special Panel is allegedly to restrict this option. Of course, if the *Ignacio* majority is correct regarding the disposition of the agencies, it would be difficult to construct any statutory scheme to avoid attempts of overreaching.[243] That such attempt should be assumed and dictate the complicated rules adopted by *Ignacio* is debatable at best.[244]

Moreover, the approach of the majority in *Ignacio* overlooks the difficulty of clearly distinguishing the realm of civil service law from that of discrimination law. To take the position that the Panel will defer now to one agency and then to another based on its determination whether the MSPB was "correct" in some abstract sense that the EEOC's decision constituted a misinterpretation of civil service law is to avoid one of the central problems that called for an independent review by the Special Panel.[245]

The delays involved in the *Ignacio* case should not escape attention. Mr. Ignacio was removed by his agency in December 1980. In September 1983, the full Board issued its decision reversing the presiding official and sustaining the removal. The second Board decision, both differing with the EEOC decision and certifying the matter to the Special Panel, was issued in January 1985.

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[241] *Id.* at 486.

[242] 30 M.S.P.R. at 483 n.11. *See also id.* at 484.

[243] There is some suggestion in the legislative record that at least the Senate had similar doubts. *See* 1978 S. Report at 59 (mandatory certification to the court of appeals).

[244] In fact, the Senate's apparent concern for overreaching resulted not in a proposal to hedge the court of appeal's authority but rather to mandate jurisdiction in the case of disagreement. *Id.*

[245] This is basically Chairman Ellingwood's argument. *See* 30 M.S.P.R. at 488-491.

Finally, in February 1986, the Special Panel handed down its decision.[246]

Stating that the statutory deadlines under section 7702[247] were missed is a gross understatement. The 1978 Conference report indicated that the deadlines were "to assure the employee the right to have as expeditious a resolution of the matter as possible" and that the Committee "expect[ed] the agencies to devote the resources and planning necessary to assure compliance with these statutory deadlines."[248] Of course, being the first case going the whole route, some delay might have been expected as the "kinks" in the system were "ironed out." However, as will be noted below,[249] delays have also affected subsequent proceedings.

Unfortunately, the second Special Panel proceeding, *Lynch v. Department of Education*,[250] was ill-starred as well. In early 1982, an employee was removed for inadequate performance. The action was affirmed by a presiding official of the MSPB. The EEOC accepted a petition to consider this decision. The EEOC's subsequent opinion differed with the MSPB's on the basis that the presiding official failed to analyze properly the issue presented (handicap discrimination). The EEOC offered what it considered to be the appropriate line of legal analysis without applying it to the facts of the case. On reference back, the Board agreed with the EEOC's general statement of discrimination law but found that the presiding official should have sustained one of the performance-related charges.[251]

In short, there was no dispute between the MSPB and the EEOC regarding the applicable law and there was no dispute between the two agencies regarding the law's application since the EEOC did not apply the law to the facts. Of course, it was such disputes that the Special Panel was intended to resolve. Nevertheless, accepting the MSPB's certification as binding on it, the *Lynch* Panel decided the case anyway, while admitting that its designed role was to resolve disputes between the MSPB and EEOC.[252] (The Panel decision was handed down in August 1986 after having been certified in January of that year, thus substantially missing the statutory forty-five day period for disposition.) The Panel viewed its role at this point as having to accept the MSPB decision if it was reasonable, which the panel found it was.[253]

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[246] *Id.*

[247] *See supra* notes 228-35 and accompanying text.

[248] 1978 Conference Report at 141.

[249] *See infra* notes 250-65.

[250] 31 M.S.P.R. 519 (Spec. Panel 1986).

[251] *Id.* at 527-30.

[252] 31 M.S.P.R. at 525.

Almost a year later, the United States District Court for the District of Columbia vacated the decision of the *Lynch* Special Panel and the MSPB decision that certified the case to the Panel.[254] It did so on the basis that the Board lacked authority in the reference back to it from the EEOC to basically reopen the initial decision of the presiding employee and issue a new decision.[255] In May 1988, on remand from the court, the Board determined that the employing agency had not made reasonable accommodation for Mr. Lynch's handicap and ordered his restoration and back pay.[256] After the Board denied its petition for reconsideration in December 1988, the OPM petitioned the Federal Circuit for judicial review of the Board's decision. Thus, seven years after the employee's removal, a final disposition has yet to be achieved. Moreover, even after a Federal Circuit decision, the employee may sue *de novo* in district court if the administrative process has not provided relief.

Encouragingly, the third Special Panel proceeding, *Shoemaker v. United States Department of the Army*,[257] neither injected additional complications into the life of the administrative structure nor ended in total futility. Finding that the MSPB was indeed correct that the EEOC had misinterpreted a civil service rule, the Special Panel accepted the Board decision under the second rule of *Ignacio*.[258] Delay plagued this case, however, with the contested removal occurring in May 1983, and the Special Panel issuing its decision in September 1987 after an MSPB certification in April 1987.

On its apparent way to a Special Panel, another recent case, *Gubisch v. Secretary of the Treasury*,[259] ran amuck. The case illustrates some additional confusion surrounding the application of Section 7702. An employee appealed his removal to the MSPB, expressly not raising an issue of handicap discrimination. He lost his MSPB appeal.[260] Soon after filing his appeal to the Board, he amended a pending EEO complaint to allege that his removal was based on discrimination. After the agency found no discrimination, an appeal was taken to the EEOC and, in addition, a petition under section 7702 was filed for EEOC consideration of the MSPB decision on the removal. The EEOC issued a decision finding a failure to afford the employee reasonable accommodation.[261]

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[253] *Id*. at 525.

[254] Lynch v. Bennett, 665 F. Supp. 62 (D.C.D.C. 1987).

[255] *Id*. at 66.

[256] Lynch v. Dep't of Educ., 37 M.S.P.R. 12, 15 (1988).

[257] 34 M.S.P.R. 597 (Spec. Panel 1987).

[258] Shoemaker v. U.S. Dep't of the Army, 34 M.S.P.R. 597, 602 (Spec. Panel 1987).

[259] 36 M.S.P.R. 634 (Spec. Panel 1988).

On reference back to the Board, the MSPB refused to consider the case under Section 7702 because it was allegedly improper for the employee to invoke mixed case procedures without having raised the issue of discrimination before the Board. Accordingly, the EEOC's acceptance of the petition for review was improper as was the EEOC's issuance of a decision on that petition.[262] The Board reaffirmed its earlier decision upholding the employee's termination.[263] The Board noted that the current EEOC mixed case regulations[264] prevent the severing of issues that apparently were the cause of the parallel proceedings and confusion in this case. The EEOC later accepted that the Board was correct in its finding that the EEOC lacked jurisdiction to consider the employee's Section 7702 petition.[265] The Commission reopened its previous decision on the EEO appeal from the agency decision on the removal and reversed its finding of discrimination. However, in April 1989, the United States District Court for the District of

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[260] Gubisch v. Sec. of the Treasury, 36 M.S.P.R. 634, 635 (Spec. Panel 1988).

[261] *Id*. at 636.

[262] *See also* Davis v. Dep't of the Navy, 37 M.S.P.R. 120, 88 F.M.S.R. ¶ 885180 (June 3, 1988) (*Gubisch* extended to case where some discrimination claims, viz., race and age, were raised before MSPB but not the one at issue, i.e., handicapping; Evcic v. Department of the Navy, 37 M.S.P.R. 9 (1988) (*Gubisch* extended to waiver of discrimination claim initially raised before MSPB).

Compare O'Neal v. U.S. Postal Serv., 37 M.S.P.R. 125 (1988) (after initial MSPB decision rejecting handicap claim and EEOC decision accepting it, full Board decision, more than 3 years after the initial one, found that the underlying action was not MSPB appealable and therefore Section 7702 was inapplicable); Maiorana v. U.S. Postal Serv., 38 M.S.P.R. 665 (1988) (seven years after allegedly improper restoration and after EEOC, on appeal of an agency decision on EEO complaint, found that the personnel action was MSPB appealable, the Board dismissed the employee's appeal to it finding the action was not MSPB appealable and thus not a mixed case, and, in addition, that the EEOC/MSPB disagreement was on a matter of "jurisdiction" and not within the cognizance of the Special Panel). *See also* Marenus v. Dep't Health & Human Serv., 39 M.S.P.R. 498 (1989) (Board waives time limits for appeal from negotiated grievance procedure in a mixed case where appellant mistakenly filed appeal with EEOC first).

[263] *Gubisch*, 36 M.S.P.R. at 638-39.

[264] *See supra* notes 198-99 and accompanying text.

[265] *See* Gubisch v. Baker, Request No. 05870472.

Columbia held that the EEOC could not reopen its prior decision and ordered full relief for the complainant.[266]

There is no indication in the EEOC's second *Gubisch* opinion that, despite section 7702, the EEOC considered itself without the power—on direct appeal to it—to award relief to the employee, even though his termination was MSPB appealable. Nor did the district court opinion enforcing the result in the initial EEOC appeal question the agency's authority in that regard. Other EEOC decisions suggest that the EEOC does consider it has the authority, at least in the absence of timely objection by the employing agency, to deal with MSPB appealable matters.

For example, in *Saenz v. Baker*[267] an employee filed an EEO complaint stating that his retirement was the result of a reprisal against him for having filed two prior EEO complaints. The agency accepted the complaint and there was an investigation and hearing by an EEOC complaints examiner. The agency then rejected a proposed finding of discrimination. The decision was reversed on appeal to the EEOC, which ordered reinstatement.[268] The agency requested that this decision be reopened on the basis that constructive discharge and the remedy of reinstatement made the case mixed and within the initial jurisdiction of the MSPB. The EEOC's prior decision was, accordingly, said to be a violation of section 7702. The EEOC, in not deciding the merits of that argument, found that the jurisdictional objection was untimely and the agency itself had treated the matter as non-mixed. The Commission then left its previous decision in place.

Discussion of *Ignacio* and subsequent cases, including those mixed cases that never came before the Special Panel, illustrates several points regarding the administrative scheme for handling mixed cases: the potential for delay (despite the statutory commands to the contrary) while the cases move through the various steps;[269] the conflict and confusion regarding the appropriate (i.e., the congressionally intended) role of the Special Panel and, on the part of those responsible for administering section 7702 (i.e., the

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[266] Gubisch v. Brady, C.A. No. 88-2031 (April 20, 1989), 49 Fair Empl. Prac. Cas. (BNA) 1063 (D.D.C. 1989).

[267] EEOC Request No. 05870534 (June 9, 1988).

[268] *Id.*

[269] *See, e.g.*, Gomez v. Dep't Air Force, 869 F.2d 852 (5th Cir. 1989) (in absence of clear assertion of power by EEOC to sever discrimination claims in mixed cases, statutory time limits for commencing civil action in district court applied to EEOC disposition of entire case).

MSPB and EEOC), regarding when that provision applies and what their authority under it is; and confusion, or at least inattention, within the agencies in sorting out mixed from non-mixed cases for processing. These difficulties place in consideration the question of whether the costs justify the benefits achieved by retaining the current structure. Certainly, even if some form of Special Panel proceeding is retained, modifications—including statutory ones—are most assuredly required. In considering these matters, it should be noted that the Conference Committee in 1978 did not expect that a Special Panel proceeding would be a frequent occurrence.[270] Fortunately, expectations of Congress have not been disappointed in that regard.

3. *Judicial Review in Mixed Cases*

The preceding discussion of mixed cases avoided the question of judicial review in instances where an employee is dissatisfied with the results of the administrative process. Both the statutory language[271] and the legislative history[272] unambiguously indicate the intent to preserve existing rights to a trial *de novo* in the United States District Courts.[273] Where exhaustion of administrative remedies is required, actions may be brought after certain steps have been completed in the administrative processing of the mixed case or after the passage of various specified time intervals where the required administrative action has not occurred.[274] The prevailing employee may obtain attorney's fees.[275] Moreover, the court has the authority to appoint an attorney to represent the employee under appropriate circumstances.[276] These statutory provisions may assist individuals who might otherwise bear the disadvantages of litigating *pro se*.

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[270] 1978 CONFERENCE REPORT, *supra* note 219, at 142.

[271] 5 U.S.C. §§ 7702(e)(1), (3) (1982).

[272] *See* 1978 CONFERENCE REPORT, *supra* note 219, at 139, 141.

[273] Apparently some agencies, including the Department of Health and Human Services, take the position that employees pursuing mixed cases through the negotiated grievance process waive a right to trial *de novo*. Since § 7121(d) clearly contemplates that mixed cases can be processed through the negotiated grievance process to the MSPB for review under § 7702, which is structured in many ways on the assumption that judicial review is available following the administrative process, it is difficult to accept an argument that would in essence put federal employees in a worse situation than employees of private employers who are not barred from trial *de novo* in the district courts following arbitration. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). *Cf.* Atchison Topeka & S.F. Ry. v. Buell, 480 U.S. 557 (1987); Barrentine v. Arkansas Best Freight Sys., 450 U.S. 728 (1981).

[274] *See, e.g.*, 5 U.S.C. § 7702(a)(2), (e) (1982). *See also* 1978 CONFERENCE REPORT, *supra* note 219, at 141-42; 29 C.F.R. § 1613.421 (1988).

[275] In MSPB and EEO processes, attorneys fees are also available. *See* 5 U.S.C. § 7701(g) (1982); 29 C.F.R. § 1613.271(d) (1988).

An employee may sue in the district court in a mixed case and argue that the agency action was not supported on the merits (i.e., the personnel side), and alternatively, that it was motivated by discrimination. The Federal Circuit has been found to lack jurisdiction over any part of a mixed case where the employee seeks to challenge the MSPB's decision on the discrimination issue.[277] Presumably the lack of jurisdiction exists regardless of whether or not the MSPB alone, the MSPB and EEOC, or the Special Panel have issued decisions. All these decisions are expressly denominated judicially "appealable actions" by section 7702.[278]

Curiously, the district court apparently is expected to conduct a "record" review on the personnel side of the case (assuming prior MSPB adjudication) using the deferential standards applicable in Federal Circuit review of the MSPB in non-mixed cases and a *de novo* review on the discrimination side.[279] How this operation is to proceed is one of the more problematic aspects of the mixed case phenomenon.

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[276] *See* 42 U.S.C. § 2000e-5(f)(1), 16(2) (1982).

[277] *See, e.g.*, Williams v. Dep't of the Army, 715 F.2d 1485 (Fed. Cir. 1983) (involving a case where the MSPB had made a decision); Doyie v. Marsh, 777 F.2d 1526 (11th Cir. 1985) (involving a case where the time limits for administrative processing had lapsed and the plaintiff filed in district court). *But see* Wall v. United States, 871 F.2d 1540 (10th Cir. 1989) (holding that Federal Circuit had exclusive jurisdiction to review an MSPB finding of lack of jurisdiction in a case where the claimant alleged but Board did not find an involuntary retirement and where that finding might, according to the court, in effect dispose of the discrimination claim on the merits).

It is not clear, however, what should happen if the employee appeals to the Federal Circuit solely on the personnel issue and then sues in District Court on the discrimination claim. The courts have not yet answered to what extent administrative findings that have been judicially reviewed are binding in the district court if preclusion would impact on the *de novo* hearing.

[278] 5 U.S.C. §§ 7702(a)(3), (b)(5)(A), (c), (d)(2)(A) (1982). An interesting question is whether, if there is a Special Panel, the OPM can obtain review of the results in the Federal Circuit. After the Panel issues its decision, the MSPB is required to order the employing agency to carry it out. *Id.* § 7702(c)(3). § 7703(d) authorizes the OPM to file a petition for judicial review in the Federal Circuit of "any final order or decision of the Board," that would seem to fit these cases, though the preconditions to filing, e.g., error of the Board, seem only awkwardly applicable to Special Panel proceedings. Since the reason that mixed cases end up in the district court is the statutory right to trial *de novo* of the employee, there would appear to be no reason why the *Williams* case should be applicable to OPM. *Cf.* Moore v. Devine, 780 F.2d 1559 (11th Cir. 1986). *See also infra* text accompanying notes 575-78. Nevertheless, the statutory language of § 7703(d) may not be sufficient as a basis of OPM's authority to petition the Federal Circuit in these cases. This is merely one aspect of the broader issue of the government's right to judicial review in discrimination cases. *See infra* notes 572-79 and accompanying text.

[279] *See, e.g.*, Ahr v. Nelson, 632 F. Supp. 148 (S.D. Tex. 1985), *aff'd*, 802 F.2d 454; Tickles v. Hodel, 38 F.E.P. Cases 272 (D.D.C. 1985).

If the court first proceeds to conduct a typical limited record deferential review of the MSPB decision and sustains it, it will then proceed to the discrimination issue. In presenting its side of this matter, the plaintiff will attempt to establish that the real reason for the firing was discrimination and that the agency's articulated reason was mere pretext. But here the court will be confronted by its prior finding that the agency in fact had a sustainable basis for the firing, including perhaps the necessary predicate that the MSPB resolution of the discrimination issue was, if not correct, at least permissible. Of course, notwithstanding that the agency may have had a legitimate basis for removing the employee, the real reason for its action may have been to discriminate on prohibited grounds. Nevertheless, a prior finding of adequate support for the administrative action must have some inhibiting effect on the court's willingness later to make its own finding of discrimination. The upshot may be that the district court may proceed to the discrimination issue first where the record is made *de novo*. The agency is allowed to produce more material supportive of its action, to rebut the plaintiff's attempt to prove pretext, than is contained in the administrative record allegedly supporting the personnel action. If the agency succeeds in defeating the plaintiff's *prima facie* case on the discrimination issue, it is possible it will still lose on the personnel side because the administrative record may be weak, lacking the material that is before the court on the discrimination charge.

If a case proceeds not through the administrative process but through the negotiated grievance process with or without MSPB review of the arbitrator's or FLRA's decision, it is simply not clear how the district court is to conduct its review of the pure "personnel" aspects of the case. Presumably, some deference to the arbitral findings on the personnel side is required.

Anomalies abound with regard to mixed cases, so such problems may not be overly surprising. Again, the factual and legal relationship of the personnel aspects of a case and the discrimination aspects create real difficulties in case management.

G. *The Role of the Office of Special Counsel and Extra-statutory Remedies*

The complicated system of appellate routes, the availability of which is determined by the type of personnel action and type of employee (including his or her inclusion or exclusion from a bargaining unit), requires careful scrutiny to determine what, if any, express statutory and regulatory procedures are available to a particular employee. The bargaining unit member must, in addition, consider the terms of the applicable collective bargaining agreement.

With respect to at least some types of actions, scrutiny will disclose that some employees are afforded only minimal protection. In the case of the probationary member of the competitive service, as an example, termination for inadequate performance or misconduct cannot, as a matter of law, be covered by the negotiated grievance process.[280] If discrimination is not involved, the EEO process is unavailable. Neither is the agency grievance system available if removal is for unsatisfactory performance.[281] Also, appeal rights to the MSPB are nonexistent for probationary employees except in very limited circumstances.[282]

Employees in this or similar positions, as well as others who choose not to rely solely on the formal appeal routes, may be able to obtain some assistance through the Office of Special Counsel [OSC]. Pursuant to the powers and duties of the OSC,[283] the Office is required to investigate allegations of prohibited personnel practices and other civil service law violations.[284] The OSC may, in its discretion, seek both corrective action from the MSPB and disciplinary action against an employee engaged in that type of practice.[285]

The 1978 Civil Service Reform Act specifically requires the Office to investigate prohibited personnel practices, including discrimination that falls within the jurisdiction of the EEOC.[286] Notwithstanding that fact, the OSC's regulations have consistently provided that, in view of the existence of the EEO administrative complaint process, the Office "will normally avoid duplicating those procedures and will defer to those procedures rather than initiating an independent investigation."[287] Deferral will not, however, occur "where it appears that the agency is not processing the complaint consistent with provisions of applicable statutes and regulations."[288] The Office asserts that, where appropriate, in lieu of investigating, it will monitor the processing of a complaint.[289] The legality of this policy remains to be determined.

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[280] *See* U.S. Dep't of Justice v. FLRA, 709 F.2d 724 (D.C. Cir. 1983); Nat'l Treasury Employees Union v. FLRA, 848 F.2d 1273 (D.C. Cir. 1988).

[281] *See* 5 C.F.R. § 771.206(c)(1)(xiii) (1988).

[282] *See* 5 C.F.R. § 315.806 (discrimination for partisan political reasons or marital status; agency failure to comply with mandated procedures).

[283] *See supra* notes 95-111 and accompanying text.

[284] *See supra* notes 99-111 and accompanying text.

[285] *Id.*

[286] 5 U.S.C. §§ 1206(a), (c) and 2302(b)(1) [as amended by Whistleblower Act in 1989].

[287] *See* 5 C.F.R. § 1251.3 (1988).

Regarding the types of corrective action available, the existence of a prohibited personnel practice such as nepotism may not mean that the complaining employee or applicant will obtain the position or benefit that was denied as a result of the illegal conduct. The statute speaks only generally of corrective remedies and does not define the type that may be granted by the MSPB. Arguably, if the MSPB sustains a charge such as nepotism, the ordinary procedures for selection or promotion will be followed thereafter. The result may be that the complaintant is still not chosen for the position.

Moreover, the scope of the OSC's authority to obtain corrective action from the MSPB is not unlimited: there must be an allegation of a prohibited personnel practice or a violation of other civil service laws.[290] This scope of authority is sufficiently broad, however, to encompass most cases where an employee has been subject to a personnel action that he or she wants to contest.[291] The proscription of prohibited personnel practices applies to positions in the competitive, excepted, and Senior Executive services[292] and to a wide spectrum of significant personnel actions.[293]

For example, take the classic case of the probationary member of the competitive service who is discharged. The employee is not protected by Chapters 43 or 75 procedures and appeals.[294] It nevertheless is a prohibited personnel practice to "discriminate for or against any employee . . . on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others."[295] In this instance, the employee might allege that the basis for the dismissal was his or her conviction of a crime such as reckless driving, purportedly having absolutely no bearing on his or her official duties. While the probationer has in these circumstances no right to resort to the MSPB, EEOC, or the negotiated grievance process (though the agency administrative grievance system may be available here), the employee can ask for the OSC's assistance and perhaps obtain an MSPB order of reinstatement and back pay.

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[288] *Id.* at § 1251.3(a).

[289] *Id.* at § 1251.3(b).

[290] *See supra* notes 99-107 and *infra* notes 591-95 and accompanying text.

[291] *See* Carducci v. Regan, 714 F.2d 171, 175 (D.C. Cir. 1983).

[292] *See supra* notes 211-13 and accompanying text and *supra* notes 150-52 and accompanying text.

[293] *See supra* note 149 and accompanying text.

[294] *See supra* note 215 and accompanying text.

[295] 5 U.S.C. § 2302(b)(10) (1988). *See generally* Harvey v. M.S.P.B., 802 F.2d 537 (D.C. Cir. 1986). *But see* Garrow v. Gramm, 856 F.2d 203 (D.C. Cir. 1988) (rejecting this provision as a sufficient basis to create a "property interest" subject to due process protection).

But what might happen if the employee asks for the OSC's assistance, an investigation is conducted, and the OSC decides not to seek MSPB corrective action? One option is to seek judicial review of the OSC's decision not to take the case to the MSPB, but, after *Heckler v. Chaney*[296] such a suit may be doomed to failure.[297]

Another option for an employee—one that might be attempted regardless of whether or not the OSC and MSPB lack jurisdiction to provide any relief—is suit in federal district court seeking judicial review of the employing agency's decision[298] under the Administrative Procedure Act.[299] Alternatively, the suit might invoke a so-called "implied right" of action theory based on the civil service statutes.[300] In fact, much litigation relying on these approaches has been brought since 1978.

The Supreme Court recently issued a decision that has profoundly affected this type of litigation. In *United States v. Fausto*,[301] a non-preference eligible member of the excepted service, suspended for misconduct, filed suit in the Claims Court under the Back Pay Act.[302] Justice Scalia, writing for the majority, took note of the absence in the Civil Service Reform Act of any provision expressly affording administrative or judicial review in the circumstances and the "comprehensive nature" of the statutory scheme including the pattern of inclusion and exclusion of specific employee classes with regard to procedural protections.[303] Justice Scalia concluded that the judicial remedy sought was unavailable in the plaintiff's case.[304]

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[296] 470 U.S. 821 (1985) (agency's decision not to take enforcement action unreviewable without congressional intent to circumscribe agency enforcement discretion).

[297] *See, e.g.*, Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988) (indicating that the only judicial review available relates to the OSC's investigation and its adequacy).

[298] In such a suit, the employee seeking declaratory and/or equitable relief may allege, for example, that the personnel action was "arbitrary" or "capricious" as a factual matter or "not in accordance with law" in the sense that it was infected by a "prohibited personnel practice." *See* 5 U.S.C. § 706 (1982).

[299] 5 U.S.C. chap. 7 (1982).

[300] In such a suit, whether brought against the agency or agency officials individually, for declaratory, injunctive or monetary relief, the argument might be that the personnel decision was infected by a prohibited personnel practice.

[301] 484 U.S. 439 (1988).

[302] 5 U.S.C. § 5596 (1982).

Earlier, Justice Scalia, as a member of the Court of Appeals for the District of Columbia Circuit, had authored the court's opinion in *Carducci v. Regan*.[305] In that case, an employee protested his reassignment through the agency grievance procedures and then to the Office of Special Counsel without success. He then sought APA review in the district court. The court of appeals rebuffed this attempt, relying on other cases arriving at similar results.[306] The outcome of *Carducci* and of many other appellate decisions indicates that the Office of Special Counsel may be the last (and, in some instances, the only) resort for an employee seeking to contest a personnel action.[307]

An exceedingly clear statement by Congress that no rights and remedies exist outside of those expressly granted in the civil service law would, except in a case where such a preclusion is unconstitutional, settle these arguments once and for all. The likelihood that Congress will be willing to do so in the near term at least is fanciful. At the same time, the potential existence of "implied" judicial remedies cannot be ignored in examining the overall structure of federal employee appeal rights. Judicial remedies impact both the managers' willingness to exercise their discretionary functions and the duties imposed on them by civil service law as well as increase the costs of governmental operation in numerous ways. Because of the lack of empirical and other evidence, this article can only mention the issue of extra-statutory remedies and urge that any statutory reform take those remedies into account.[308]

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[303] United States v. Fausto, 484 U.S. ____, 108 S. Ct. 668 (1988); *see also* Webster v. Doe, 484 U.S. 439 (1988) (national security termination not subject to APA review on non-constitutional grounds). The extent of influence of *Fausto* is seen, for example, in recent cases limiting extension of the NGP process to removals of non-preference eligible excepted service employees. *See* Dep't of Treasury v. FLRA, 58 U.S.L.W. 2170, No. 88-1159 (D.C. Cir. 1989). *See also* Karahalios v. Nat'l Federation of Fed. Employees, ____U.S. ____, 109 S. Ct. 1282 (1989) (no private cause of action by federal employees for breach of union's statutory duty of fair representation—relying in part on *Fausto*).

[304] *Fausto*, 108 S. Ct. at 677.

[305] 714 F.2d 171 (D.C. Cir. 1983).

[306] *Id*. at 173, citing Borrell v. U.S. Int'l Communications Agency, 682 F.2d 981 (D.C. Cir. 1982), and Cutts v. Fowler, 692 F.2d 138 (D.C. Cir. 1982).

[307] *See, e.g.*, Booher v. U.S. Postal Serv., 843 F.2d 943 (6th Cir. 1988) (probationary employee may not sue unless clear disregard of agency regulation shown); Harrison v. Bowen, 815 F.2d 1505 (D.C. Cir. 1987). *But cf*. Lynch v. Bennett, 665 F. Supp. 62 (D.D.C. 1987) (permitting APA review for procedural errors in second Special Panel proceeding). *Compare* Webster v. Doe, 486 U.S. 592 (1988) (national security suspension, if based on constitutionally impermissible policy, is judicially reviewable) *with* Schweiker v. Chilicky, ____U.S. ____, 108 S. Ct. 2460 (1988) (*Bivens* remedy not available to claimants allegedly denied Social Security benefits unconstitutionally). *See also Spagnola*, 859 F.2d 223 (en banc per curiam opinion) (rejecting *Bivens* remedies for constitutional violations but preserving equitable remedies, citing cases both pro and con). *See generally* Note, *The Scope of* Bush v. Lucas*: An Examination of Congressional Remedies for Whistleblowers*, 88 COLUM. L. REV. 587 (1988) (dealing with the right to raise constitutional claims). *See generally* U.S. MERIT SYSTEMS PROTECTION BOARD, THE OFFICE OF SPECIAL COUNSEL: JUDICIAL VIEWS ON PROSECUTION OF PROHIBITED PERSONNEL PRACTICES (1987).

III. The Various Appeal Systems in Operation

Statistics rarely tell the whole story but they cannot be ignored in judging the need for and feasibility of reform. The statistics reported herein were either contained in agency annual or special reports or furnished at the author's request by agency officials. Unfortunately, the statistical record is incomplete in a variety of arguably important respects. Much of the other information contained in this section was gleaned from interviews with agency and union officials, arbitrators, and private attorneys.

A. Merit Systems Protection Board

During the 1988 fiscal year, there were 6,402 initial appeals decided on procedural or substantive grounds by MSPB administrative judges.[309] Fifty-two percent, or 3,348, involved adverse actions (basically Chapter 75 matters), and four percent, or 273, were Chapter 43 proceedings.[310] During the six year period of 1983 to 1988, while the total number of initial appeals decided declined from 8,076 to 6,402, the percentage of adverse actions and performance-based actions decided by the Board remained largely stable.[311]

The settlement rate of initial appeals is very high indeed, partly in response to the Board's announced policy in favor of informal resolution of disputes. Since 1984, the rate has risen steadily from six percent of cases that are not dismissed on procedural grounds to forty-eight percent in 1988.[312] Settlements may include acceptance by the employee of his or her dismissal in return for cleansing the employment record of various particulars or mitigation of the initial agency-imposed sanction. In examining settlement rates for particular types of action, in fiscal 1987, forty-eight percent of adverse action appeals and fifty-six percent of performance actions were settled.[313] In 1988, sixty-three percent of adverse action cases and sixty-seven percent of performance actions were settled.[314]

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[308] *See infra* note 598 and following text.

[309] U.S. Merit Systems Protection Board, Annual Report Fiscal Year 1988 [hereinafter 1988 MSPB Annual Report] at 30.

[310] *Id.* at 31.

[311] *Id.*; U.S. Merit Systems Protection Board, A Study of Cases Decided By the U.S. Merit Systems Protection Board in Fiscal Year 1987 [hereinafter 1987 MSPB Case Report] at 11.

Some private practitioners and agencies have been critical of the Board's emphasis on settlement. Critics believe that this emphasis has encouraged overly aggressive pursuit of pre-trial resolution by administrative judges.[315] Those officials receive performance awards in part based on their respective settlement rate.

With regard to the cases that were not settled or dismissed but rather were adjudicated on the merits, the rates for initial decisions affirming employing agencies' actions remained relatively constant between fiscal years 1983 and 1988. The affirmation rates have ranged from a high of 80.3 percent in 1988 to a low of seventy percent in 1985.[316] However, when all initial decisions issued are considered, thirty-two percent modified the agency action in some way.[317] This appears to be in large part the result of the MSPB settlement initiative.[318]

The MSPB has adopted a policy that all initial appeals (whether or not discrimination is alleged) be decided within 120 days from the date of filing.[319] Given the pre-1978 history of delay in adjudication of employee appeals,[320] Congress in the Civil Service

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[312] 1988 MSPB Annual Report, *supra* note 309, at 39.

[313] 1987 MSPB Case Report, *supra* note 311, at 9.

[314] U.S. Merit Systems Protection Board, A Study of Cases Decided By the U.S. Merit Systems Protection Board in Fiscal Year 1988 [hereinafter 1988 MSPB Case Report] at 9.

[315] *See, e.g.*, McCullough v. U.S. Postal Service, 40 M.S.P.R. 476, 89 F.M.S.R. ¶ 895158 (May 9, 1989) (in response to petition for review of initial decision, Board concluded that there was insufficient evidence to conclude that administrative judge coerced settlement).

[316] 1988 MSPB Annual Report, *supra* note 309, at 31; 1987 MSPB Case Report, *supra* note 311, at 11.

[317] 1988 MSPB Case Report, *supra* note 314, at 13.

[318] *Id*.

[319] *See, e.g.*, *id*. at 5.

[320] *See* 1978 S. Report, *supra* note 70, at 10.

Reform Act required the Board to establish clear deadlines for case disposition.[321] The act dictates that the deadlines are to be "consistent with the interests of fairness."[322] As a result, the time to process an initial appeal has dropped from an average of 199 days in fiscal year 1983 to seventy-three days in fiscal year 1988.[323] In 1988, 99.6 percent of initial appeals were decided within the 120 day period.[324] This compared to 99.8 percent in 1987.[325]

Some though not all private practitioners and even some agency officials interviewed found that the emphasis on the 120 day limit interferes with their ability to prepare for more complex cases.[326] Mixed cases, requiring discovery and trial time to probe witnesses in order to present inferential proof of improper motive, would be an example of a complex case. Of course, with mixed cases the statute itself imposes a 120 day deadline for MSPB disposition.[327] Violation of that deadline allows the appellant to file a suit in the District Courts under the anti-discrimination statutes.[328] The point of some of the interviewees was, however, that if an employee wants to proceed through the administrative process, the Board and the presiding officials should be more flexible.

With regard to representation at the MSPB, *pro se* appellants constitute a very significant portion of the total. For example, from January 1 to September 30, 1987, appellants were represented by private attorneys about thirty-one percent of the time and by unions about sixteen percent of the time. On the other hand, forty-five percent represented themselves and nine percent were represented by friends, family members, or co-workers with presumably little or no legal training.[329] In 1988, only fifty-five percent of appellants were represented by an attorney, union representative, or other person.[330] The available statistics do not disclose the extent to which the percentage of *pro se* appearances varies depending on the type of case, e.g., adverse action versus a retirement decision, and the particular MSPB regional office, though there is some indication that such variances indeed occur. For example, apparently in the Washington, D.C. Regional Office, appellants in Chapters 43 and 75 actions are generally represented by counsel. It also appears that, for reasons now obscure, hearings are held in fewer cases where legal representation of the appellant is absent (twelve percent) than in others (thirty-one percent).[331]

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[321] 5 U.S.C. § 7701(i)(1) (1982).

[322] *Id.*

[323] 1988 MSPB ANNUAL REPORT, *supra* note 309, at 30; 1987 MSPB CASE REPORT, *supra* note 311, at 13.

[324] 1988 MSPB ANNUAL REPORT, *supra* note 309, at 30.

[325] 1987 MSPB CASE REPORT, *supra* note 311, at 12-13

[326] *But see* U.S. GENERAL ACCOUNTING OFFICE, MERIT SYSTEMS PROTECTION BOARD: CASE PROCESSING TIMELINESS AND PARTICIPANTS' VIEWS ON BOARD ACTIVITIES, GAO/GGD-87-97 at 22-23 (indicating some dissatisfaction with time limits but seeming to suggest that shorter rather than longer time limits were favored by most respondents to survey). *See also* Biberstine v. Dodds, DC 07528710301 (July 1, 1988) (granting a continuance that will cause a case to go beyond the 120 limit is not in itself reason to deny an otherwise proper continuance in a non-discrimination case).

[327] *See* 5 U.S.C. § 7702(a)(1) (1982).

[328] 5 U.S.C. § 7702(e)(1)(B).

[329] 1987 MSPB CASE REPORT, *supra* note 311, at 14.

Regarding mixed cases, the available EEOC and MSPB statistics were, unfortunately, less than complete. Of the 6,512 initial MSPB appeals decided during fiscal 1987, there were 1,682 (twenty-six percent) where discrimination was alleged.[332] During 1988, in 1,898 of the 6,402 initial appeals decided (thirty percent) there were allegations of discrimination.[333] These figures apparently represent all of the mixed cases that came before the MSPB whether as mixed appeals or cases that originated with a mixed complaint in the EEO process.[334] In 305 of the cases in 1987 and 945 of the cases in 1988, the allegations of discrimination were withdrawn.[335] Of the 2,540 initial appeals not dismissed or settled in 1987, one percent (fifteen) of the cases involved reversal of agency action on the basis of a discrimination finding.[336] During 1987, of the 1,377 initial appeals in which decisions were issued on allegations of discrimination, a finding of discrimination was issued in four percent (fifty-three) of the cases.[337] In 1988, of the 2066 initial appeals not dismissed or settled, one percent (fifteen cases) involved reversal of the agency action on the basis of a discrimination finding.[338] Of the 953 cases in which decisions were issued in 1988 on allegations of discrimination, a finding of discrimination was issued in two percent (22) of the cases.[339]

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[330] 1988 MSPB ANNUAL REPORT, *supra* note 309, at 31.

[331] 1988 MSPB CASE REPORT, *supra* note 314, at 19.

[332] 1987 MSPB CASE REPORT, *supra* note 311, at 13.

[333] 1988 MSPB CASE REPORT, *supra* note 314, at 17.

[334] *See supra* notes 198-99 and accompanying text.

[335] 1987 MSPB CASE REPORT, *supra* note 311, at 13; 1988 MSPB CASE REPORT, *supra* note 314, at 17.

[336] 1987 MSPB CASE REPORT, *supra* note 311, at 8-9.

[337] *Id.* at 13.

[338] 1988 MSPB CASE REPORT, *supra* note 314, at 10.

[339] *Id.* at 16.

Almost seven hundred mixed case appeals were decided by Board presiding officials during the 1983 fiscal year, about 1250 in 1984, and over one thousand in 1985, with the processing time in the regions decreasing at a rate similar to that experienced in other categories of cases. Finally, in only fourteen instances in 1986, eight in 1987, and thirteen in 1988 did the Board review arbitration awards in mixed cases.[340] Prior to 1986, no cases moved to the Board from the negotiated grievance process.

The other important statistics relating to mixed cases in the MSPB process relate to those that move from the MSPB to the EEOC and back again. The MSPB typically "sends" to the EEOC about 190 cases a year (161 in 1988).[341] This number is approximately ten percent of the number of mixed cases decided by the MSPB in 1987. Generally, the EEOC accepts a petition absent procedural defects, despite the scope of discretion given the Commission under the statute not to accept a petition.[342]

In 1983, eleven mixed cases,[343] and, in 1984, nine cases, were remanded by the Commission to the Board.[344] In 1987, twenty-four cases,[345] and, in 1988, four cases were remanded.[346] Estimated average processing time by the EEOC has been steadily reduced to an average of about eighty-two days in 1987. The cases where disagreement has been most likely to occur are in the handicap discrimination area.

In evaluating these statistics, it is important to note that the EEOC is not statutorily authorized to conduct a fully *de novo* review of MSPB decisions. The EEOC may differ with the Board only if the MSPB was incorrect in its interpretation of discrimination law (presumably *de novo* examination is available here) or if the MSPB decision on the facts with respect to the discrimination issue "is not supported by the evidence in the record as a whole."[347] The latter standard is apparently construed by the EEOC to suggest a "substantial evidence" approach in the manner of *Universal Camera Corp. v. National Labor Relations Board*:[348]

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[340] 1987 MSPB CASE REPORT, *supra* note 311, at 26; 1988 MSPB ANNUAL REPORT, *supra* note 309, at 37.

[341] 1987 MSPB CASE REPORT, *supra* note 311, at 27.

[342] *See* 5 U.S.C. § 7702(b)(2) (1982).

[343] MERIT SYSTEMS PROTECTION BOARD, 1983 ANNUAL REPORT at 23.

[344] MERIT SYSTEMS PROTECTION BOARD, 1984 ANNUAL REPORT at 25.

[345] 1987 MSPB CASE REPORT, *supra* note 311, at 27.

[346] 1988 MSPB CASE REPORT, *supra* note 314, at 36.

[347] *See* 5 U.S.C. § 7702(b)(3)(B)(ii) (1982).

[348] 340 U.S. 474 (1951).

could a "reasonable man" come to the conclusions on the facts reached by the MSPB, not whether the EEOC on its own would reach those same results.[349] No statistics are available indicating how often the EEOC differs with the MSPB on purely legal issues and how often on factual findings.

On reference back to the MSPB, the Board generally concurs with the EEOC's decision. For example, in 1987, the Board differed with the EEOC only once in the twenty-two cases decided that year.[350] In 1988, the Board adopted the EEOC finding in eight of the twelve cases decided.[351] Finally, as noted previously, there were only three certifications to Special Panels between 1979 and 1988.

B. Equal Employment Opportunity Commission

The statistics currently compiled by the Commission do not segregate mixed from non-mixed cases. Accordingly, at this time, it is impossible to determine with accuracy the frequency with which claimants use the mixed case complaint process in lieu of filing initially with the MSPB where the personnel action is MSPB appealable.

Quite a few interviewees felt that often the EEOC process acts as a catchall for complaints where discrimination is not really at issue but there is no other avenue through which the employee can obtain the intervention of a third party to express a judgment on the merits of his or her dispute with management or to otherwise become involved in the resolution of the matter. A similar perception existed in 1978.[352]

The volume of claims moving through the EEO process is truly staggering. Table 1 presents statistics for 1986, 1987, and 1988[353] that, if not entirely typical, give a general sense of the movement through the system.

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[349] That EEOC review should be deferential is supported by the legislative history. *See* 1978 CONFERENCE REPORT, *supra* note 219, at 140:

> In making a new decision the EEOC must determine that: (1) the MSPB decision constitutes an incorrect interpretation of any law, rule, or regulation, over which the EEOC has jurisdiction; or (2) *the application of such law to the evidence in the record is unsupported by such evidence as a matter of law* (emphasis added).

[350] 1987 MSPB CASE REPORT, *supra* note 311, at 27.

[351] 1988 MSPB CASE REPORT, *supra* note 314, at 36. In the remaining four, no certification to the Special Panel occurred because the Board found that the cases did not fall within the purview of § 7702.

[352] *See* PRESIDENT'S PERSONNEL MANAGEMENT PROJECT, APPENDIX IV at 19.

[353] The statistics for 1986 are from the EEOC'S REPORT ON PRE-COMPLAINT COUNSELING AND COMPLAINT PROCESSING BY FEDERAL AGENCIES FOR FISCAL YEAR 1986 [hereinafter 1986

Where requested by the claimant, there is a hearing before an EEO administrative judge.The administrative judge recommends a decision for acceptance, modification, or rejection by the agency.[354] During 1986, agencies acted on 1,405 recommended decisions, during 1987, 1,478 such decisions, and during 1988 2068 such decisions. Of the 1,405 in 1986, there were 246 recommended findings of discrimination;[355] in 1987, there were 244 recommended decisions finding discrimination;[356] and in 1988, there were 323 recommended decisions finding discrimination.[357] A recommenda-

Table 1

	Counseling Contacts*	Complaints Files*	Complaints Rejected**	Average Days to Rejection	Complaints Cancelled**	Average Days to Cancellation
1986	86,906	18,167	2,572	115	1,701	360
1987	83,416	15,931	2,668	142	1,575	387
1988	79,903	15,972	3,178	84	1,768	482

	Complaints Withdrawn**	Average Days to Withdrawal	Complaints Settled**	Average Days to Settlement	Agency Decisions Issued**	Average Days to Agency Decision
1986	3,057	222	5,456	257	5,176	615***
1987	3,519	299	4,828	356	4,424	683***
1988	2,758	272	5,346	396	4,794	607***

* The United States Postal Service has accounted for more than 50% of the EEO caseload in recent years.

** These figures may not include all complaints filed during the reporting period due to case backlog.

*** Generally, there is a statutory and regulatory limit of 180 days for processing a complaint.

EEOC REPORT]. The statistics for 1987 are from the EEOC's REPORT ON PRE-COMPLAINT COUNSELING AND COMPLAINT PROCESSING BY FEDERAL AGENCIES FOR FISCAL YEAR 1987 [hereinafter 1987 EEOC REPORT]. The statistic for 1988 are from the EEOC's REPORT ON PRE-COMPLAINT COUNSELING AND COMPLAINT PROCESSING BY FEDERAL AGENCIES FOR FISCAL YEAR 1988 [hereinafter 1988 EEOC REPORT].

For purposes of Table 1, "rejection" refers to dismissal of a complaint generally at the filing stage for various reasons, including untimeliness. 29 C.F.R. § 1613.215 (1988). Cancellation refers to dismissal after filing for non-prosecution or other reasons. *Id.*

[354] *See supra* notes 133-37 and accompanying text.

[355] 1986 EEOC REPORT, *supra* note 353, at 27.

[356] 1987 EEOC REPORT, *supra* note 353, at 31.

[357] 1988 EEOC REPORT, *supra* note 353, at 36.

tion by the administrative judge may be either in favor of or against a finding of discrimination. Between 1981 and 1988, when an administrative judge recommended a finding of discrimination, the agency acceptance rate varied from a high of 52 percent of these recommendations in 1988 to a low of 37.3% in 1987.[358] When the presiding official recommended a finding of no discrimination, however,the acceptance rate varied from a low of 86.6 percent in 1986 to a high of 97.4 percent (1988).[359]

In response to the latter figures, the EEOC noted in its 1986 report:

> It is reasonable to expect some differences between the rate at which an agency accepts Recommended Decisions finding discrimination and the rate at which an agency accepts Recommended Decisions finding no discrimination. However, the disparities between the number and percentage of Recommended Decisions accepted where discrimination is found compared to a finding of no discrimination are too great.[360]

It is interesting to note that the small rate of agency findings of discrimination has not changed much over the years. In 1974, under regulations similar to those currently in existence, federal agencies found discrimination in only one out of six cases.[361]

A comparison of statistics with respect to MSPB findings of discrimination in initial appeals in mixed cases and findings of discrimination in EEOC recommended decisions is illuminating. In 1987, of the 1,377 cases in which initial decisions by the MSPB were issued on allegations of discrimination, there were findings of discrimination in four percent or fifty-three of the cases.[362] For 1988, of the 953 cases in which decisions were issued on allegations of discrimination, a finding of discrimination was issued in two percent (22) of the cases.[363]

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[358] 1986 EEOC REPORT, *supra* note 353, at 27-81; 1987 EEOC REPORT, *supra* note 353, at 30-31; 1988 EEOC REPORT, *supra* note 353, at 36.

[359] 1986 EEOC REPORT, *supra* note 353, at 28; 1987 EEOC REPORT, *supra* note 353, at 31; 1988 EEOC REPORT, *supra* note 353, at 36.

[360] 1986 EEOC REPORT, *supra* note 353, at 29. *See also* 1988 EEOC REPORT, *supra* note 353, at 36.

[361] See PRESIDENT'S PERSONNEL MANAGEMENT PROJECT, APPENDIX IV, at 19 (citing a congressional study).

[362] 1987 MSPB CASE REPORT, *supra* note 311, at 13. In only 15 of these cases did the finding of discrimination result in a reversal of the agency decision. *Id.* at 8. In the remaining 38 there may have been a settlement or reasons other than discrimination for the final MSPB action.

[363] 1988 MSPB CASE REPORT, *supra* note 314, at 16. In only 15 of these cases did the finding of discrimination result in a reversal of the agency action.

In 1986, there were 5,176 agency decisions disposing of EEO complaints other than by dismissal or settlement[364] and only 1,405 EEOC recommended decisions on which agencies took action, of which 246 found discrimination.[365] In 1987, there were 4,424 agency decisions disposing of EEO complaints other than by dismissal or settlement[366] and only 1,478 recommended decisions on which agencies took action.[367] Of these, 244 found discrimination.[368] Finally in 1988 there were 4794 such agency decisions,[369] only 2068 recommended decisions on which agencies took action,[370] and 323 findings of discrimination.[371] Recommended decisions need not be accepted by an agency. As noted above, recommended decisions are often rejected where a finding of discrimination is proposed.[372] For current purposes, assume that all of the recommended decisions are accepted. (This assumption is supported by the fact that, to some unknown extent, an agency decision with or without a recommended decision might include a finding of discrimination and the EEOC does reject on appeal agency decisions finding no discrimination.) On this basis, of adjudicated EEO cases, in five percent there was a finding of discrimination in 1986, six percent during 1987, and seven percent during 1988.

The statistics suggest that a decision favorable to an employee on a discrimination claim is more likely—but not dramatically so—to be forthcoming in the EEO process than in the MSPB process. Aside from general questions of statistical significance, some care must be taken before a firm conclusion may be drawn. For example, the statistics regarding EEO cases include only those decided on the merits (not dismissed or settled). The MSPB figures are apparently more inclusive. The 1987 MSPB report, for instance, notes that while mixed cases constituted twenty-six percent (1,682) of the total (mixed and non-mixed) appeals decided (6,512),[373] the Board's presiding officials decided on the merits only 2,540[374] including both mixed and non-mixed. Unless mixed cases involve substantially lower dismissal and settlement rates than other cases, it would not be expected that the percentage of mixed cases decided on the merits would exceed fifty percent of all appeals decided on the merits when they compose only one quarter of all cases "disposed of."

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[364] 1986 EEOC REPORT, *supra* note 353, at A-12.

[365] *Id.* at A-21.

[366] 1987 EEOC REPORT, *supra* note 353, at A-12.

[367] *Id.* at A-21.

[368] *Id.* at A-22.

[369] 1988 EEOC REPORT, *supra* note 353, at A-12.

[370] *Id.* at A-22.

[371] *Id.*

[372] *See supra* notes 354-60 and accompanying text.

[373] *See* 1987 MSPB CASE REPORT, *supra* note 311, at 13.

[374] *Id.* at 9.

Moreover, the types of cases coming through the EEOC process, which do not include the important performance and disciplinary actions, may be unique in ways that throw a different light on the meaning of the comparative figures. There may indeed be other reasons to question the current statistical base.

Following an agency decision on the merits of an EEO complaint, there is a right of appeal to the Commission itself in non-mixed cases.[375] In 1986, there were 3,319 direct commission appeals, in 1987, 3,649, and, in 1988, 3,866.[376] The EEOC may also be asked to review EEO cases that have been initially processed through the negotiated grievance process. In 1986, there were forty-five of these, in 1987, thirty-nine, and in 1988, forty-four. These numbers have remained relatively stable over the years.

The EEOC's Office of Review and Appeals' processing time for cases received dropped from 285 days in the first quarter of fiscal year 1988 to 140 days in the last quarter.[377] Almost one half of the appeals in 1988 came from the Postal Service.[378] In 1988, the EEOC issued decisions based on procedural grounds (improper rejection or inadequate investigation) in 3,880 cases.[379] In 1454 cases (thirty-seven percent), the Commission reversed the agency.[380] In 1988, the EEOC issued merits decisions in 1,881 cases.[381] In 222 cases (twelve percent), the agency decision was reversed or modified.[382]

One final note relates to the nature of employee representation in the EEO process. While there is a dearth of hard data in this area, the 1986 EEOC complaint processing report recognized that "[f]ederal complainants generally complete a complaint form or letter without assistance from a person who has expertise in the area of EEO law. A lack of professional assistance at the counseling and filing stages of the process may contribute to the number of complaints that are rejected and cancelled."[383] Interviews with private attorneys and agency officials, along with various other sources, also suggested that there is a very high percentage of federal employees who proceed through the process without either union representation (in the case of an employee in a bargaining unit) or their own attorneys. Unions sometimes do provide representation, at least to dues-paying members as is the case in the MSPB process.

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[375] *See supra* notes 139-41 and accompanying text.

[376] Telephone Interview with Ronald Copeland, Deputy Director Office of Review and Appeals of the EEOC (December, 1988).

[377] OFFICE OF REVIEW AND APPEALS, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FY 1988 ANNUAL REPORT.

[378] *Id.*

[379] *Id.*

[380] *Id.*

[381] *Id.*

[382] *Id.*

C. The Negotiated Grievance Process

The relevant data relating to the use of the negotiated grievance process includes that data pertaining to the issuance of arbitration awards and reviews by the FLRA. The available information is skimpy and undetailed; only the general outlines of process flow can be ascertained with some degree of confidence.

The parties to bargaining agreements can limit the coverage by an NGP of personnel actions.[384] The desire to limit coverage must be clearly stated by the parties.[385] Thus, the dearth of particular types of matters processed through a negotiated grievance process might at first glance be attributed in part to exclusions from coverage and not employee (or union) choice in particular cases. At the same time, generally speaking, negotiated grievance processes do include EEO matters and Chapters 43 and 75 actions. Relevant OPM statistics are listed in Table 2.

Assuming coverage, a grievance can be disposed of at various stages. The grievance may be disposed of prior to arbitration or result in an arbitration award and/or the filing of exceptions with the FLRA, appeals to the EEOC or, in mixed cases, to the MSPB. There is simply no data regarding the number of pre-arbitration withdrawals, settlements, or other resolutions or the type of complaints disposed of in that manner.

OPM attempts to collect all arbitral awards, while estimating it may get seventy-five to eighty percent of them. OPM's Labor

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[383] 1986 EEOC Report, *supra* note 353, at 13. *See also* 1987 EEOC Report, *supra* note 353, at 18.

[384] *See* 5 U.S.C. § 7121(a)(2) (1982).

[385] *Id.*

Table 2

Statutory Exclusions: Negotiated Grievance Procedure

	Records		Employees	
	Total	Percent	Total	Percent
Totals on File	2,283	—	1,305,776	—
1. Excludes Discrimination:	195	8.5%	79,894	6.1%
2. Excludes Discrimination & 432:	18	.78%	5,560	.43%
3. Excludes Discrimination, 432 & 752:	165	7.2%	70,889	5.8%
4. Excludes 432:	13	.56%	4,148	.32%
5. Excludes 752:	46	2.0%	18,235	1.4%
6. Excludes 432 & 752:	11	.48%	2,847	.21%
7. Excludes Discrimination & 752	85	3.7%	51,565	3.9%
Total Exclusions	533	23.22%	233,138	18.16%

Agreement Information Retrieval System (LAIRS) indicates the following numbers of awards per calendar year (including Chapters 43 and 75 actions but excluding awards in postal worker cases): 602 (1979); 790 (1980); 787 (1981); 731 (1982); 890 (1983); 772 (1984); 611 (1985); 595 (1986); 636 (1987); 480 (1988). In considering these figures, note that the awards do not necessarily represent the types of personnel actions that are the focus of this report. The NGP processes a variety of complaints of varying nature by either the individual employee or the union. Statistical information indicating the nature of the underlying disputes giving rise to these awards was not available in all instances from OPM.

1. *Arbitration Awards in Chapters 43 and 75 Actions*

OPM does maintain statistics relating to arbitration awards in Chapters 43 and 75 actions. The numbers with the results (percentage affirmed, mitigated, and reversed) of the arbitral decisions are listed in Table 3.

For comparative purposes, the statistics for the MSPB for 1986, 1987, and 1988 with regard to adjudicated cases (whether disposed of "on the merits" or procedures and whether or not involving claims of discrimination) are listed in Table 4.

See, e.g., Horner v. Bell, 825 F.2d 382 (Fed. Cir. 1987).

U.S. MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FISCAL YEAR 1986 at 19. Of the reversals, most were based on the "merits," though some were the results of procedural errors or findings of discrimination. *Id*.

1987 MSPB CASE REPORT, *supra* note 311, at 10.

1988 MSPB CASE REPORT, *supra* note 314, at 12.

Table 3**

Year	Ch. 75	Ch. 43	Aff.	Mit.	Rev.*
			(percentages)		
FY 1984•	83	20	(75) 37.0	39.7	22.8
			(43) 50.0	15.0	35.0
FY 1985•	67	18	(75) 55.2	32.8	11.9
			(43) 61.6	5.5***	33.3
FY 1986•	80	15	(75) 51.2	22.5	26.2
			(43) 53.3	6.6***	40.0
FY 1987•	48	13	(75) 54.1	33.3	12.5
			(43) 53.8	15.3	30.7
FY 1988•	52	11	(75) 40.3	30.7	28.8
			(43) 63.6	0.0	36.3

• The figures do not include awards in postal worker or TVA employee cases.

* These reversals are presumably merits and procedural reversals.

** The statistics do not disclose how many of these cases are "mixed."

*** Includes only one case. While agency penalties may be modified by the MSPB or arbitrators in Chapter 75 actions, an agency penalty imposed under Chapter 43 cannot be modified.[366]

Table 4

Year	Ch. 75	Ch. 43	Aff.	Mit.	Rev.
			(percentages)		
FY 1986[367]	1,376*	Not Available	(75) 76	6	17
		(N/A)	(43) N/A	N/A	N/A
FY 1987[368]	1,167	116	(75) 77	8	15
			(43) 78	0	22
FY 1988[369]	876	78	(75) 75	9	16
			(43) 78	0	22

* Includes 372 decisions in postal workers cases and nineteen in TVA employee cases in 1986. Similar statistics for 1987 were not available.

Prior to 1986, the MSPB statistics for Chapters 43 and 75 actions—which do not separate mitigations and reversals—were as listed in Table 5.

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[367] U.S. Merit Systems Protection Board, Study of MSPB Appeals Decisions for

Table 5

Decisions on Merits

Year	Ch. 75	Ch. 43	(percentages) Rev./Mit.
FY 1983[390]	1,791*	N/A	(75) 16 (43) N/A
FY 1984[391]	1,869*	N/A	(75) 17 (43) N/A
FY 1985[392]	1,475*	214	(75) 22 (43) 21

* Includes decisions in postal workers cases, which were 357, 440, and 388 in 1983-85, respectively, and TVA employee cases, which were thirty-five, thirty-eight, and nineteen in 1983-1985, respectively.

These statistics indicate a marked difference between the results of the MSPB and the arbitral processes,[393] particularly with regard to mitigation in Chapter 75 actions. While some individuals interviewed indicated that they considered the MSPB process to be "management" oriented, others including some union officials did not share this opinion.[394] There may, in fact, be a vicious circle involved to the extent the results of cases before the Board appear more adverse to the employee than the results of arbitration. If, as some people suggested, unions are more likely to take cases with good chances of success to arbitration because, among other things, they view the MSPB process as management oriented, then the higher agency affirmance rate and lower mitigation rate before the MSPB might be explained at least in part by the weaker nature of the employees' cases presented to the Board for decision. The

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FY 1983, Appendix 1 (non-air traffic controller appeals). *See also* 1987 MSPB Case Report, *supra* note 311, at 21, 23, 25.

[391] *See* U.S. Merit Systems Protection Board, Study of MSPB Appeals Decisions for FY 1984, Appendix 2 (non-air traffic controller appeals). *See also* 1987 MSPB Case Report, *supra* note 311, at 12, 14, 15.

[392] U.S. Merit Systems Protection Board, Study of MSPB Appeals Decisions for FY 1985, Appendices 6, 9, 10 (non-air traffic controller appeals).

[393] While there may be appeals from initial decisions to the full Board, of the cases appealed (one in five), the Board leaves the administrative judge's decision standing almost 90% of the time, *see* 1988 MSPB Case Report, *supra* note 314, at 25, 28, and even where changes are made, they may be in favor of the agency. *Id.* at 28-30.

[394] For a somewhat similar reflection of views, see U.S. General Accounting Office, Merit Systems Protection Board: Case Processing of Timeliness and Participants' Views on Board Activities, GAO/GGD-87-97.

inevitable loss rate at the MSPB would then reinforce union and employee aversion to the Board process. By the same token, if management looks at the same statistics, it might conclude that arbitrators are "kinder" to the union than the Board and this could create hostility to arbitration on the basis of "union bias."

This is not to say, however, that misperception alone is accountable for the apparent widespread union aversion to use of the MSPB process and the differing statistics. The nature of arbitration itself, including its informality, the characteristics of arbitrators, and the fact that arbitration is intimately linked to the collective bargaining process and the evolving labor-management relationship, inevitably means that results are likely to differ from the legalistic process of the MSPB. The MSPB, as an agency, stands apart from direct involvement in the union-management dialogue. One prominent and well-respected federal sector arbitrator, during an interview, expressed his conception of his role as focusing on the facts of the particular case before him, while he saw the Board as more concerned with the development of legal doctrine. Since it would be difficult to argue that Congress in 1978 did not realize the way arbitration generally functions, an apparently divergent pattern of results between the MSPB and arbitrators in Chapters 43 and 75 actions does not by itself indicate that the arbitration system is going awry. Rather, it is likely operating in the fashion intended (or at least foreseen) by the authors of the 1978 CSRA.

Many interviewees, including those intimately involved with the negotiated grievance process, expressed the opinion that arbitrators, more often than not, "split the baby," giving something to both sides (e.g., a reprimand rather than removal). However, others noted that if an arbitrator was perceived as doing that consistently, ultimately he or she would be stricken from the lists because neither party would want their good cases compromised in that fashion.[395]

Ironically, the efforts at the MSPB to settle cases, which may often mean that agencies must accept results that only partially vindicate their positions, are likely bringing the MSPB process and the arbitral process much closer together than the statistics relating to adjudicated cases suggest. If the results of the MSPB process are not viewed as compromising the vindication of merit system principles (a matter that is disputed), it is difficult to argue that arbitration is a worse offender in that regard even if in fact arbitrators are "splitting the baby" in a substantial number of instances by, for example, mitigating agency-imposed penalties.

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[395] *See* R. Valtin, *A Word to the Arbitrator in Training*, ARBITRATION IN PRACTICE 1, 4 (1984) ("Splitting for the sake of retention of acceptability is awful."). Such compromise also runs afoul of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the National Academy of Arbitrators, the American Arbitration Association and the Federal Mediation and Conciliation Service (I.A.2.).

2. *Statutorily Mandated Uniformity Between the MSPB and Arbitral Processes in Chapters 43 and 75 Actions*

In Chapters 43 and 75 actions that go to a hearing, where the statute attempts to assure some degree of uniformity between the MSPB process and arbitration,[396] apparent differences in patterns of results may be attributable to several factors. For example, the difference may result from the divergent perspectives from which the purely factual elements are viewed. In other cases, one forum may apply a different procedural approach or legal principle. Regardless, this disuniformity may encourage forum shopping.

In *Cornelius v. Nutt*,[397] the Supreme Court held that arbitrators must follow the statutory "harmful error" rule[398] as interpreted by the MSPB. However, in dicta, the Court noted that "Congress clearly intended that an arbitrator would apply the same substantive rules as the Board does in reviewing an agency disciplinary decision" in order to promote consistency and to avoid forum shopping.[399] This statement has provoked disputes regarding the extent to which the arbitral proceeding must be a mirror image of the Board's processes.[400]

Exact congruence in all regards was certainly not intended by Congress in 1978. The fact that the CSRA expressly mentions certain procedures to be applied by both the MSPB and arbitrators suggests that arbitrators are free to depart from the MSPB format regarding matters not mentioned. The "consistency" referred to in the legislative history is consistency in treatment of those aspects of procedure that the statute makes expressly applicable to both the MSPB and arbitration.[401] As the Supreme Court acknowledged in *Alexander v. Gardner-Denver Co.*,[402] it is the characteristic informality of arbitration that enables it to function in an efficient and expeditious fashion, though this very informality may mean that the results of a judicialized process and arbitration will differ.[403]

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[396] *See* 5 U.S.C. §§ 7121(e)(2), 7701(c)(1) (1982) (burdens of proof—substantial evidence in Chapter 43 actions and preponderance of evidence in other cases), § 7701(c)(2) (defenses including harmful error rule).

[397] 472 U.S. 648 (1985).

[398] Pursuant to 5 U.S.C. § 7701(c)(2)(a), where an agency has sustained its burden of proof, its decision may not be upheld if the employee shows that harmful error occurred in the application of the agency's procedures in arriving at the decision.

[399] Cornelius v. Nutt, 472 U.S. 648, 660 (1985).

[400] *See, e.g.*, Fishgold & Jacksteit, *Implications of* Cornelius v. Nutt *for Federal Sector Arbitrators*, 43 ARB. J. 14 (March 1988).

Congress provided that judicial review of arbitration in Chapters 43 and 75 actions would be conducted "in the same manner and under the same conditions" as review of MSPB orders.[404] In this fashion, "conformity between the decisions of arbitrators with those of the Merit Systems Protection Board"[405] would allegedly be achieved. Thus, the same courts would review both and, pursuant to the same scope of review, examine the decision for arbitrariness, abuse of discretion, legal error, and lack of substantial evidence.[406] However, since the general standard of "reasonableness" is the lodestar of review of agency fact-finding and law application under this type of scope of review,[407] the CSRA allowed for a broad range of permissible decisions in Chapters 43 and 75 actions, thus leaving room for the development of patterns of different results in the MSPB and arbitral processes. As noted above, such a pattern has developed, particularly with regard to mitigation of agency-imposed sanctions in Chapter 75 actions.[408] Moreover, since penalty determinations are generally reviewed with special deference to the agency,[409] judicial review of mitigations under an abuse of discretion standard will inevitably establish a particularly expansive range for differences in sustainable results in the two processes. Finally, since the government's right to appeal from both the MSPB and an arbitrator in a Chapters 43 and 75 action is conditioned on the existence of an error in the interpretation of civil service law that will have substantial impact,[410] Congress further insulated from correction differing patterns of results in cases at the MSPB and before arbitrators where those are not traceable to errors of legal interpretation.

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[401] *See* 1978 CONFERENCE REPORT, *supra* note 219, at 157.

[402] 415 U.S. 36 (1974).

[403] *Id.* at 58-9.

[404] *See* 5 U.S.C. § 7121(f) (1982).

[405] *Id.*; 1987 S. REPORT, *supra* note 70, at 111.

[406] *See* 5 U.S.C. § 7703(c) (1982).

[407] *See, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[408] *See supra* notes 387-93 and accompanying text.

[409] *See, e.g.*, Miguel v. Dept. of Army, 727 F.2d 1081 (Fed. Cir. 1984).

In short, it might be said that Congress in 1978 intended to attain as close a match in the end results of Chapters 43 and 75 adjudication as possible given the differing inherent natures of the MSPB process and arbitration.[411] Yet the same substantive principles and statutorily prescribed procedures were also intended to ensure at least some basic uniformity.[412] Uniformity in terms of the substantive rules applied is required in the principal performance-based and disciplinary actions by the need to avoid inequality in treatment at the level of legal doctrine on policy (though perhaps not constitutional) grounds.

3. *Judicial Review to Enforce Uniformity*

In 1978, the mechanism for enforcement of uniformity was to place reviewing authority with regard to both the MSPB and arbitrators in Chapters 43 and 75 actions in the same courts, viz., the Courts of Appeals and the Court of Claims, and subject decisions to the same scope of review.[413] The Federal Courts Improvement Act of 1982 vested exclusive review authority in the Federal Circuit.[414] The legislative history of the 1978 Act suggests that the Federal Circuit require that arbitrators follow MSPB substantive precedents.[415] Given the institutional continuity of the Board and the fact that civil service issues are the Board's principal concern compared to the ad hoc involvement of individual arbitrators, there is a strong policy argument for deference to the Board. In fact, the Supreme Court opinion in *Nutt* supports such a general approach.[416]

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[410] *See* 5 U.S.C. § 7703(d) (1982).

[411] *Accord, e.g.*, Devine v. Sutermeister, 724 F.2d 1558, 1565 (Fed. Cir. 1983).

[412] *See also* Devine v. Pastore, 732 F.2d 213 (D.C. Cir. 1984) (MSPB scope of review of agency penalty appealable to arbitrator).

[413] *See* 1978 S. REPORT, *supra* note 70, at 111. The House bill was different. The Conference Committee accepted the Senate version. *See* 1978 CONFERENCE REPORT, *supra* note 219, at 153.

[414] P.L. 97-164, Title I, Part B, § 144, 96 Stat. 45 (1982) (codified as amended at 5 U.S.C. § 7703 (1982)).

[415] *See* 1978 S. REPORT, *supra* note 70, at 111: "The provision for judicial review is intended to assure conformity between the decisions of arbitrators with those of the Merit Systems Protection Board."

[416] *See Nutt*, 472 U.S. at 659-62.

Where a Chapters 43 or 75 action involves various types of prohibited discrimination, matters become more complicated. In a case that goes to arbitration, direct review by the MSPB of the arbitrator's decision may assure that the required uniformity is achieved.[417] But what happens if, rather than invoking such review or following its completion, a dissatisfied employee sues in district court claiming a right to trial *de novo* under the discrimination laws?[418] The Federal Circuit lacks jurisdiction over mixed cases,[419] and the responsibility for ensuring that the mandated uniformity between Board and arbitral proceedings in terms of the substantive personnel law applied would devolve on the district court in reviewing the personnel side of the case. Similarly, compliance by the arbitrator with the statutorily required procedures, such as the harmful-error rule and the burdens of proof, must be enforced as to the purely personnel issues, though they must be jettisoned when the court deals with the discrimination issue.[420] As noted before, this bifurcated approach presents various administrative and other difficulties which are hardly less when the decision being reviewed is that of an arbitrator and not the MSPB.[421]

Where an agency loses at the Board or arbitral level in a Chapters 43 or 75 action (whether or not mixed), the ability of the government to command the Federal Circuit's attention is limited to cases where the decision allegedly constitutes an erroneous interpretation of civil service law that will have a substantial impact.[422] The court has rather consistently suggested that review of an award on OPM's petition with respect to application of established rules is less appropriate under the statute than determining whether the arbitrator applied the correct legal principles, in part to recognize the traditional judicial deference to the results of arbitration.[423]

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[417] *See supra* note 207 and accompanying text.

[418] *But see supra* note 273.

[419] *See supra* text accompanying note 277.

[420] *See supra* text accompanying note 279.

[421] *Id.*

[422] *See supra* text accompanying notes 78-81.

[423] *See, e.g.*, Devine v. Sutermeister, 724 F.2d 1558, 1566 (Fed. Cir. 1983) (questioning whether the issue of an arbitrator's balancing of the factors concerning mitigation of penalty is properly appealed by OPM). *See also* Devine v. White, 697 F.2d 441 (D.C. Cir. 1983); Feigenbaum, *The Relationship Between Arbitration and Administrative Procedures in the Disciplining and Discharge of Federal Employees*, LABOR L.J. 586 (Sept., 1983) ("[I]f the allegation is not that the arbitrator ignored the law or applied the wrong provision of the law but that arguably the arbitrator's judgment in applying the law was incorrect, then no 'substantial impact' should be found.").

Recently, however, this narrow approach has been taken to an unfortunate and arguably incorrect extreme. In *Horner v. Bell*,[424] the Federal Circuit applied *Nutt* to hold that, since the MSPB could not modify an agency penalty imposed under Chapter 43,[425] neither could an arbitrator.[426] Following this decision, however, in *Horner v. Garza*,[427] the same court refused to review an arbitral award on the petition of OPM where the arbitrator clearly violated the non-mitigation rule. The explanation offered was that the clear circuit precedent of *Bell* and the fact (so the court assumed) that the award was *ultra vires* (presumably because it was contrary to *Bell*) and thus unenforceable meant that other arbitrators would not be encouraged to issue similarly infirm awards.[428] Thus, the award at issue would be of no substantial impact on the civil service system.[429] But if the Federal Circuit's assigned role in the system does not include the responsibility to enforce, when asked, its view of the correct legal doctrine—at least in clear cases of violation—it is very likely that the uniformity on the level of legal doctrine between Board proceedings and arbitration will not be obtained in the manner and to the extent intended by Congress. If the Federal Circuit abstains, the only other authority likely to undertake vindication of applicable law is the FLRA. But that agency has to date enforced arbitration awards in unfair labor practice proceedings without scrutiny of their underlying legality except in a very narrow category of cases.[430] If *Garza* impels it to reconsider that position, the ironic result will be to shift responsibility for uniformity between the MSPB and arbitration to the FLRA. In short, either arbitrators will not have to take the obligation of uniformity seriously or the FLRA will have to fill a role for which it was not designed.

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[424] 825 F.2d 382 (Fed. Cir. 1987).

[425] *See* Lisiecki v. MSPB, 769 F.2d 1558, 1568 (Fed. Cir. 1985).

[426] *Bell*, 825 F.2d at 390.

[427] 832 F.2d 150 (Fed. Cir. 1987).

[428] *Id.* at 151.

[429] In such a case, the agency might refuse to comply with the award and, in an unfair labor practice proceeding, try to collaterally attack the award on the basis of the arbitrator's lack of "jurisdiction". *See, e.g.*, U.A. Cent. Office & AFGE, 27 F.L.R.A. 385 (1987); U.S. Dep't of Justice v. AFGE, 22 F.L.R.A. 928, 932 (1986). Whether the FLRA would depart from its usual rule of not hearing a challenge to arbitral awards on the merits in a ULP proceeding is unclear.

[430] *See supra* note 429. An agency that, in a Chapter 43 or 75 action, loses before the arbitrator and can generally obtain review in the Federal Circuit only with OPM's concurrence and the reviewing court's permission, may obtain some review before the FLRA and the regional court of appeals by refusing to comply with the award. *See* American Fed'n of Gov't Employees v. FLRA, 850 F.2d 782 (D.C. Cir. 1988). This also means that in some limited instances the FLRA's jurisdiction encompasses Chapter 43 and 75 actions.

4. *Choice of the MSPB Over the NGP Route in Chapters 43 and 75 Actions*

At this point, we should turn to a comparison of the number of adverse action and performance-based actions that are decided by the MSPB and arbitrators. As indicated previously, employees may choose to take Chapters 43 and 75 actions to either the MSPB or the NGP.[431] During the 1987 fiscal year, initial appeals at the MSPB in adverse actions totalled 3,303 and performance-based actions totalled 308 (including mixed cases in both).[432] During 1988, the numbers were largely similar: 3,348 adverse actions and 273 performance actions (including mixed cases in both).[433]

While the OPM figures cited above[434] refer to cases resulting in awards, and not all matters processed through the NGP (many of which may be settled or dropped), it appears that many more Chapters 43 and 75 actions go the MSPB route—unless the pre-arbitration settlement rate is extraordinary.[435] Is this because there is no choice by the employee, since the collective bargaining agreement excludes these types of actions (unlikely)? Is this because a large share of the MSPB actions relate to employees not included in bargaining units? Could it be that many are weak cases unions do not want to take to arbitration?

Or is it because the MSPB process is "free" while the union must pay some of the costs of arbitration and, given the size of the union treasury, opting for the perceived more favorable arbitration process is simply not feasible? Or because employees avoid the NGP since it is the union's and not the employee's choice to invoke arbitration and once a grievance is filed with an agency the statutory route is generally foreclosed? Is it due to the fact that the MSPB process, ironically enough, may be faster in some cases than arbitration despite the traditional wisdom that one of the benefits of arbitration is its expedition compared to that of a legalistic process? Or could it be the procedural protections of the

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[431] *See supra* text accompanying notes 204, 206.

[432] *See* 1987 MSPB Case Report, *supra* note 311, at 7.

[433] 1988 MSPB Annual Report, *supra* note 309, at 31.

[434] *See supra* text preceding note 386.

[435] This is true even if MSPB decisions in postal workers and TVA employee cases are disregarded on the basis that the OPM arbitration figures do not include such awards.

MSPB process? There may be other reasons, including the newness of the NGP route and the fact that, until 1978, the avenue familiar to federal workers was the administrative process for adverse actions. There are no statistics that clearly answer these questions. Common sense suggests that many of these elements in varying degrees result in the apparent disproportionate distribution of Chapters 43 and 75 actions 8between the NGP and MSPB processes.

5. *Choice of the Statutory Over the NGP Route in Discrimination Cases*

Similarly, EEO cases (whether or not mixed) proceed through the NGP route at a substantially lower rate than through the statutory processes. (As in the case of Chapters 43 and 75 actions, there is a statutory right to choose one route over the other despite the coverage of an NGP[436]). Available statistics, along with the dearth of EEOC and MSPB reviews of arbitral awards in discrimination cases[437] confirm this impression, which was gleaned from interviews with agency and union officials. The reason most often given for this apparent phenomenon is not that discrimination complaints do not fall within the scope of collective bargaining agreements. Rather, the cost-free nature of the EEO process from the union's point of view is an important consideration, as may perhaps be a perception that many EEO claims lack substance as discrimination matters. Table 6, which lists OPM statistics for 1979-89, illustrates the breakdown of reported arbitration awards that include an allegation of discrimination (including some types not of concern here such as marital status and whistleblowing).

Since discovery, which may be particularly valuable in cases of alleged discrimination, is not generally available in arbitration while in the EEO process both the agency investigator and the hearing officer have affirmative responsibilities to ferret out the facts, an employee may feel at a particular disadvantage in filing a grievance.[438] Moreover, despite its problems—delay being one of the most evident—the EEO process, having existed prior to 1978, is familiar to most federal employees.

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[436] *See supra* text accompanying notes 206-10.

[437] See *supra* text accompanying notes 340, 375-77.

[438] Once an initial election of the NGP in an EEO case is made, the employee can only obtain a restricted EEOC or MSPB review of the merits of the award on the discrimination issue. *See supra* text accompanying notes 207, 210.

Employees may, in fact, not entirely trust the negotiated grievance process because EEO allegations may reflect on fellow bargaining unit members or even union officials.
This suggests to the employee that his or her complaint will not be vigorously pursued. Also, there may be a concern that union representatives lack expertise in discrimination law.

Finally, there may be a sense that as between an arbitrator who sits on an ad hoc basis and the EEOC administrative judge, the latter is more likely to be both sympathetic to and knowledgeable about the nuances of discrimination law.[439] EEOC review of the arbitral decision is very narrow and employees may be unaware of its availability because, for example, the arbitrator's award may not contain notice of the right to further appeals. These and other factors are likely all at work to some degree. Where the personnel action at issue presents a mixed case, there is no doubt a confluence of the factors present in straight Chapters 43 and 75 actions along with those peculiar to claims of discrimination that may point to the MSPB process.

6. *Timeliness of Arbitration vs. MSPB Process*

While no statistics are available regarding the timeliness of arbitration, many, if not most, interviewees suggested that the

Table 6

Year	Number of All Awards	Awards Involving Discrimination Claim	Percentage of Awards Including Discrimination Claim
1979	602	43	7
1980	790	24	3
1981	787	27	3
1982	731	27	4
1983	890	58	7
1984	772	55	7
1985	611	39	6
1986	595	53	9
1987	636	41	6
1988	480	31	6

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[439] *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 57-8 and 58 n.19 (1974). *See also* Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, An Equal Employment Opportunity Practice Guide 152-175 (Fed. Bar Ass'n 1977). *But see* President's Personnel Management Project, Appendix IV to Final Staff Report 25 (indicates a favorable attitude toward the use of arbitration or at least a willingness to experiment given the perceived speed of the process).

current MSPB process, with its relatively strict 120 day limit for initial adjudication, is probably at least as expeditious as arbitration in most cases. However, appeal of an initial decision to the full Board, which occurs in about one out of five cases,[440] extends the time of final disposition in the MSPB process, since it may take over 150 days on average for the Board to dispose of a petition for review.[441]

D. Federal Labor Relations Authority

The FLRA received the following number of appeals of grievance arbitration awards: 60 (1979); 101 (1980); 153 (1981); 150 (1982); 223 (1983); 220 (1984); 210 (1985); 228 (1986); 221 (1987); and 204 (1988).[442] Comparing these numbers with the OPM's statistics regarding the number of grievance arbitration awards in the federal sector,[443] approximately thirty percent of the awards each year are taken to the FLRA on exceptions, a figure that is relatively close to the number of petitions for review filed annually with the full Board.[444]

As in the case of the Board, the goal of expeditious resolution of matters presented to it has been a matter of high priority for the Authority, which has steadily reduced its backlog of pending cases. It has a six month processing goal applicable to matters filed with it. On October 1, 1983, its arbitration docket included 248 cases.[445] Three years later, it included 71 cases.[446] During the 1986 fiscal year, the average number of days to close an arbitration case was 189 as compared to 359 days during fiscal year 1984.[447] In short, the Board and the Authority are very close in their times of disposition of appeals beyond the initial hearing stage.

Regarding the filing of exceptions and the results, certain statistics are significant. Between January 13, 1979, and December

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[440] *See* 1987 MSPB CASE REPORT, *supra* note 314, at 19.

[441] *Id.* at 23. *See also* 1988 MSPB CASE REPORT, *supra* note 314, at 30 (average 184 days to process a petition for review in 1988).

[442] 51 Fed. Reg. 45,754 (Dec. 22, 1986) (statistics provided as supplementary information and thus not codified).

[443] *See supra* text accompanying notes 384-85. Between 1979 and 1988, there were a total of 1,770 arbitration appeals to the FLRA. OPM figures suggest at least 5,994 arbitration awards during this period in non-Chapter 43 and 75 actions (assuming 90 Chapter 43 and 75 actions per year, or 900 for 1979-88, which matters are not FLRA appealable).

[444] 51 Fed. Reg. 45,754.

[445] *Id.*

[446] *Id.*

[447] *Id.*

31, 1988, unions filed with the Authority exceptions in 912 (60.2 percent) cases, agencies filed 589 (38.8 percent), and employees filed fifteen (one percent).[448] During that period, awards were sustained in over seventy percent of the cases filed by a union and in over forty-six percent of the cases filed by an agency.[449] Awards were modified or set aside in 2.3 percent of the cases filed by the union and 44.5 percent of the cases filed by an agency.[450] The Authority found that the exceptions were untimely in 19.2 percent of the union appeals and in only 4.9 percent of the agency appeals.[451] Moreover, almost always, the ground for modification or setting aside was that the arbitrator's award violated some law, rule, or regulation.[452]

From these statistics, an observer might rush to conclude that the FLRA would not be viewed very favorably by unions, would be adored by management, and that arbitrators are doing a terrible job in knowing and applying, as they must, federal law in the course of disposing of cases. A closer scrutiny of the statistics, along with the interviews conducted as part of this study, dispels these impressions to some extent. For example, often agency officials representing management's side seemed to have a less than charitable view of the substantive performance of the FLRA,[453] though this may have been due in some cases to the recollection of a particular case or two that should have been won but was not.

With regard to the performance by arbitrators, it must be noted that of the 1,516 cases involving exceptions to arbitration awards disposed of by the FLRA between 1979 and 1988, the award was modified or set aside in 286 cases (18.9 percent).[454] In a large majority of these cases, the modification or set aside occurred on the basis of a violation of a law, rule, or regulation and involved agency filed exceptions.[455] Given the newness of arbitration in the federal sector and the steep learning curve accordingly required of arbitrators, most of whom had not had experience prior to 1978 with the Federal Personnel Manual and other civil service regulations, this is a reasonably respectable record.[456]

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[448] *See* Memorandum for DOD Component Labor Relations Offices, Decisions of the Federal Labor Relations Authority on Exceptions to Arbitration Awards Filed Under 5 U.S.C. 7122(a) (Jan. 6, 1988) [hereinafter DOD Arbitration Memorandum]. These statistics count a case with both union and agency filed exceptions as two cases. For some unknown reason, the DOD's figures for arbitration appeals (1,516) is less than numbers supplied by the FLRA (1,770).

While OPM statistics on arbitration awards relate only to grievance arbitration, the DOD and FLRA data apparently include some (approximately 10) interest arbitration awards (those which determine the terms of collective bargaining agreements).

[449] *Id.*

[450] *Id.*

[451] *Id.*

[452] *Id. See supra* text accompanying note 121.

[453] This critical view has been expressed by courts and commentators. *See* Rosenbloom, *The Federal Labor Relations Authority*, 17 POL'Y STUDIES J. ____(1988-89).

[454] *See supra* note 448.

Moreover, the 286 cases must be compared to the arbitration awards issued between 1979 and 1988 that were appealable to the FLRA. OPM's statistics suggest that a total of no less than 6,894 awards were issued during this period and that on an average less than ninety a year, or nine hundred for this ten year period, related to Chapters 43 and 75 actions that are not appealable to the Authority but rather to the Federal Circuit. This reduces the approximate number of FLRA appealable awards to 5,994. Assuming that an agency (or union) would appeal an award if clearly contrary to law, the record of arbitrators in generally following applicable federal law appears to be even better.[457]

Of course, it might be argued that, in many of these 5,994 cases, the real dispute was over the facts and that the content of applicable legal principles was of minor concern. Accordingly, the argument may go, the lack of appeals and/or reversals by the FLRA does not necessarily prove that arbitrators are doing well in determining and applying federal law. But to the extent that is true, opposition to arbitration in the federal sector cannot be heavily premised on the inability of federal arbitrators to know and apply the law.

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[455] DOD Arbitration Memorandum, *supra* note 448.

[456] In the private sector, less than one percent of arbitration awards are challenged and only a small fraction of these challenges are successful. *See* Nolan, *Federal Sector Labor Arbitration: Differences, Problems, and Cures*, Grievance Arbitration in the Federal Service 10 (D. Reischl & R. Smith eds. 1987). As noted *supra* text accompanying note 443, 30% of awards in non-Chapter 43 and 75 actions were challenged in appeals to the FLRA and approximately 18% of these were set aside or modified. No statistics were available indicating how often Chapter 43 and 75 actions result in arbitral awards challenged and, when challenged, how many were reversed or modified by the Federal Circuit. Given the greater impingement on the federal arbitrator's discretion imposed by external law as compared to the situation facing the private arbitrator, along with the fact that arbitration is only newly arrived in the federal sector and not fully "accepted" by at least some agencies, the disproportionate results in the public and private sector cannot, by themselves, show that arbitration is working poorly or should be abandoned. *See id.* at 10 (concluding that there are problems but also cures).

Of course, the ability of arbitrators to faithfully follow federal law is, to a great degree, dependent on the quality of the representation of both sides involved in the arbitral process. The parties should bring relevant authority to the arbitrator's attention, though often they may fail to do so, not based on design, but ignorance of the relevant law.

[457] Moreover, taking the FLRA reversal rate as indicative of "real" errors by arbitrators might be questioned on the basis of the FLRA's own poor record of surviving appeals of its decisions (outside the arbitration context) in the regional courts of appeals. *See* Rosenbloom, *supra* note 453.

In talking with various agency officials, it was apparent that, as a general matter, the more the agency and the union used an established panel of arbitrators who could thereby accumulate expertise in federal civil service law, the more likely there was a perception that arbitrators were adequately applying federal law.

Representation in arbitration varies for both sides. Sometimes a lawyer may represent the union or the agency or both and sometimes the representative may be a non-lawyer shop steward or a labor relations specialist. Some representatives, knowledgeable about the complicated system of legal regulation that must be considered by the arbitrator, present relevant statutes, rules, and cases to the arbitrator for consideration. On other occasions, the representatives, as well as the arbitrator, apparently work in blissful ignorance of controlling authority. At times, a knowledgeable party may "stonewall" by withholding relevant material at the hearing stage, only to introduce it before the FLRA and obtain a reversal.

Finally, similarities between the FLRA and MSPB jurisdictions should be noted. The MSPB may be required to construe collective bargaining agreements in those cases where appellants are bargaining-unit members who opt to go to the Board in Chapters 43 and 75 cases.[458] The same provisions of those agreements may come before the FLRA in matters not appealable to the Board. Moreover, as to those personnel actions that might otherwise be appealable to the Board, such as denials of within-grade pay increases and reductions-in-force, the coverage of the action by a negotiated grievance process means that the FLRA is the reviewing authority; the FLRA's review searches for legal error based on many of the same sources that might be construed by the MSPB in similar actions not covered by an NGP. In addition, the existence of a prohibited personnel practice is a defense before the

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[458] *Cf. e.g.*, Horner v. Schuck, 843 F.2d 1368, 1372-74 (Fed. Cir. 1988).

Board and may likewise be raised in FLRA review of an arbitration award.[459]

Neither any provision of the 1978 CSRA nor the reasoning in *Nutt*[460] compels either arbitrators or the FLRA in non-Chapters 43 and 75 actions to adhere to Board precedent and procedures even where the matters might, absent coverage by an NGP, be appealable to the MSPB. The FLRA has acted consistent with this view. For example, with regard to the standard for judging within-grade pay increase denials, the FLRA has refused to hold arbitrators to the Board's approach.[461] Furthermore, unlike the situation involving the relationship between the EEOC and the MSPB, the 1978 Act established no mechanism to reconcile divergent MSPB/FLRA views with one possible exception: in a mixed case moving out of the arbitration process, the MSPB can review at employee request the matter and, as noted previously, it takes the position that it will apply Board precedent.[462] Finally, judicial review of FLRA decisions regarding arbitral awards is largely unavailable.

In fact, however, the potential for substantial conflicting declarations regarding the interpretation of civil service law by the MSPB and the FLRA has not to date become a reality according to those persons interviewed as part of this study. Moreover, even where inconsistency exists (or may in the future arise), it might not create problems for managers in knowing what to do in a particular case. If the employee subject to the personnel action is in a bargaining unit whose NGP covers the matter, the manager can look to FLRA precedent as governing non-mixed non-Chapters 43 and 75 matters. However, a claim of discrimination allows an employee to opt out of the NGP initially or following arbitration and proceed to the Board where the personnel action at issue is MSPB appealable. A manager, thus, could be put in a quandary by inconsistent FLRA/MSPB positions due to the inability to determine at the decisional stage whether a discrimination claim will later arise.[463]

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[459] For example, an arbitral award might be seen as "contrary to law" where a prohibited personnel practice infects the personnel action and the arbitrator upholds the action.

[460] *See supra* text accompanying notes 397-400. *Nutt* emphasized congressional concern for consistency and avoiding forum shopping in Chapter 43 and 75 actions that do not go to the FLRA. 472 U.S. at 661.

[461] *See* Fishgold & Jacksteit, *supra* note 400, at 23-24. The FLRA has held that arbitrators need not apply the "substantial evidence" burden of proof here; *see, e.g.*, Dep't of Educ., Div. of Civil Rights and AFGE Local 3887, 17 F.L.R.A. 997 (1985), which the MSPB, by regulation, follows in its proceedings.

[462] *See supra* note 207.

E. *Agency Administrative Grievance Systems*

If statistics are relatively sparse regarding the negotiated grievance process, they appear to be largely absent when it comes to the agency administrative grievance systems and their workings. OPM supplied the author with very rough (and probably largely understated) estimates that for 1985, 1986, and 1987, the number of grievances filed was 4,260, 3,645, and 3,660 respectively. In talking with agency officials, little additional specific data regarding the usage and operation of this appeal route was revealed.

In its 1982 study of selected administrative grievance systems,[464] the General Accounting Office noted as problems the untimely processing of grievances and the apparent lack of formal systematic methods (including data collection[465]) to determine how well the systems operated.[466] Only recently has OPM undertaken its own empirical study of these systems, examining both their design and operation.[467]

F. *Office of Special Counsel*

Since 1979, the Office of Special Counsel has worked with a staff of approximately eighty individuals and with an annual budget in the neighborhood of $4.5 million.[468]

During the 1985 fiscal year, the OSC received 1,280 complaints alleging prohibited personnel practices and other violations of civil service laws (excluding the Hatch Act).[469] It completed 155 field investigations and filed approximately ten cases with the MSPB for disciplinary action based on prohibited personnel practices.[470] During the 1986 fiscal year, it received 1,307 complaints, initiated approximately eight disciplinary actions before the MSPB, and completed 197 field investigations.[471]

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[463] *See infra* text accompanying note 488.

[464] *See* U.S. General Accounting Office, Agency Administrative Systems Need Attention, GAO/FPCD 83-15, Dec. 22, 1982.

[465] *Id.* at 5.

[466] *Id.* at 1.

[467] OPM regulations indicate that the Office will review these systems to determine their compliance with its regulations. *See* 5 C.F.R. § 792.304 (1988).

[468] *See* Office of the Special Counsel, a Report to Congress From the Office of the Special Counsel/Fiscal Year 1987 at 2 (draft).

[469] Office of Special Counsel, a Report to Congress From the Office of the Special Counsel/Fiscal Year 1985 at 7, 11, 12.

[470] *Id.* at 11.

During the 1987 fiscal year, the Office received 1,325 new allegations and complaints. The largest number (245) of allegations and complaints was related to reprisals for whistleblowing and the next highest number (234) was related to discrimination (where the Office usually defers to the EEO process).[472] It completed 145 full investigations during the year, some of which had been initiated the prior year.[473] Of the investigations closed during 1987, the Office initiated formal corrective or disciplinary action in eleven cases and sought or obtained informal corrective action in thirteen cases.[474] Additionally, as a result of initial examination of complaints and full investigations conducted before or during 1987, the OSC initiated or obtained eight formal corrective actions (i.e., referral to agencies following a finding of a prohibited personnel practice with no need to ask the Board for assistance), thirty informal corrective actions, and nine disciplinary actions.[475]

Clearly, there is a consistent pattern of substantial winnowing out from the point of intake to final disposition. Lack of resources is not offered as an express reason for the failure to institute more investigations or to take more corrective or disciplinary actions.[476] The judgment of the Office is that many complaints are either outside OSC jurisdiction or simply groundless determined on the basis of initial investigation.[477]

Recent judicial decisions that point to the OSC as the avenue of last (or only) resort for many federal employees,[478] along with the Whistleblower Protection Act of 1989, which establishes that the primary role of the Office is the protection of individual employees,[479] raise serious questions regarding whether the Office can adequately perform its intended function. OPM statistics, for example, note that during fiscal years 1984 to 1987, 4,038, 4,717, 4,365, and 5,338 federal employees respectively were discharged where there were no appeal rights available.[480] These figures do not cover the multifarious types of personnel actions where removal is not involved and there are no statutory appeals available. Even assuming that many allegations of prohibited personnel practices and other violations of civil service rules are groundless, the statute requires some type of investigation where allegations are presented.[481] A substantial increase in allegations presented to the OSC in response to both the current judicial approach and the role of the Office envisioned by the 1989 whistleblower legislation will seriously tax the Office's ability to do an adequate investigatory job in view of the rather meager financial resources available. Clearly, if the Office goes beyond mere preliminary investigation to a full field investigation and institution of corrective and/or disciplinary action in many more cases than it does currently, its resources will be depleted long before many claimants receive satisfaction.

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[471] Office of Special Counsel, a Report to Congress From the Office of the Special Counsel/Fiscal Year 1986 4, 7.

[472] Office of Special Counsel, a Report to Congress From the Office of the Special Counsel/Fiscal Year 1987 (draft) at 18, 20.

[473] *Id.* at 25.

[474] *Id.*

[475] *Id.* at 27.

[476] *See, e.g.*, Testimony of Mary F. Wieseman, Special Counsel, Before the Civil Service Subcommittee of the House Committee on Post Office and Civil Service Concerning The Whistleblower Protection Act of 1987, H.R. 25, March 10, 1987. This position received support from the GAO in 1985. *See* Whistleblower Complainants Rarely Qualify for Office of Special Counsel Protection, GOA/GGD 85-53, May 10, 1985.

[477] *Id.*

[478] *See supra* text accompanying notes 305-07.

[479] *See infra* text accompanying notes 584-88.

IV. General Conclusions and Recommendations

The Civil Service Reform Act of 1978 was motivated in part by a desire to simplify and expedite the procedures for handling federal employee appeals.[482] While the MSPB, EEOC, and FLRA have over the years made substantial efforts—some successful, though ironically, also in part controversial—to speed up the process, simplicity is hardly a characteristic of the system as it currently exists. Nor is it likely that the flow charts now gracing federal personnel offices can be radically streamlined. A decade has not seen the passing of some of the fundamental concerns and political forces that were in large part responsible for the contours of the 1978 reforms. In addition, there is good reason to question the wisdom of certain possible ways to eliminate existing complications. For instance, despite its problems, the overall system is working reasonably well. Ten years have allowed at least some managers and employees to develop some familiarity with its "in's" and "out's." To start from a substantially new script will itself impose many costs. However, experience under the CSRA and close scrutiny may clear the way for some modest simplification.

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[480] U.S. Office of Personnel Management, Summary of Selected Information on Discharges, Suspensions, and Changes to Lower Grade (July 1988).

[481] *See supra* text accompanying notes 99, 105.

[482] *See, e.g.*, 1978 S. Report, *supra* note 70, at 10. *See generally* Final Staff Report, *supra* note 63, at 58-62. *See also* Ingraham, *The Civil Service Reform Act of 1978: Its Design and Legislative History*, Legislating Bureaucratic Change: The Civil Service Reform Act of 1978 1, 13-28 (1984).

Federal unions are, without doubt, wedded to arbitration as the means for solving workplace employee problems. Absent the substantial erosion of their political capital, elimination of the negotiated grievance process is not likely. Assuming adequate financial resources could be assured to the unions, the alternative of limiting bargaining unit members to the grievance process might be acceptable to many union officials. This type of change would certainly simplify matters. In addition, this alternative would possibly result in earlier settlements, expedite final resolution of those cases (particularly discrimination matters) that go to hearing, and reduce agency processing costs (e.g., in discrimination cases).[483]

It is not clear, however, that federal employees would find this solution acceptable as long as the choice to go to arbitration lies in the hands of the union. Even if the choice were the employee's and unions could levy a service charge on bargaining unit members to defray the costs of the arbitral proceedings, would employees trust the unions to adequately protect their interests in all cases and would they trust the arbitral process in important performance and disciplinary actions where they lack the procedural protections of a quasi-judicial proceeding?

Such a change might increase individual agency expenses overall since agencies would presumably have to share some part of the cost of arbitration with the unions in all cases (not just EEO matters). It may also increase overall governmental expense for dispute resolution since the MSPB process would have to remain in place for non-unit members.

Allowing the MSPB to deal exclusively with mixed cases may be unpalatable to various groups because of distrust of the adequacy of its processes to faithfully vindicate the purposes of the anti-discrimination laws. It is not so much that the MSPB is perceived as hostile to equal employment opportunity. Rather, an alleged lack of knowledge of EEO law by the Board's presiding officials and a strong sense for the nuances of its application and the factual patterns that may suggest discrimination, a perceived focus on civil service rules and policies (narrowly conceived not to include discrimination law), and the current emphasis on avoiding delay, which may undercut the ability to develop an adequate case on the discrimination issues (among other factors) may combine to support continued EEOC involvement in mixed cases. It is clear that the dismantlement of the old Civil Service Commission and the vesting of its functions in two separate entities—the Board and the OPM—has not dispelled the view, in some quarters at least, that the MSPB is "management oriented" in ways that may undercut achievement of equal opportunity goals.

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[483] *See infra* text accompanying notes 507-08.

However, while the available statistics are not plentiful and their meaning might be disputed, the perceptions that the EEOC must be involved in mixed case processing in order to protect those goals must be carefully examined. This is particularly important in view of the costs occasioned by the delays and confusion that arise from the current structure of mixed case appeals. Vesting concurrent or exclusive jurisdiction in EEOC in these cases may only further complicate the system without creating off-setting benefits.

A. *The Negotiated Grievance Process and the Federal Labor Relations Authority*

As the discussion previously indicated, grievance arbitration is apparently functioning reasonably well in the federal sector. It is unlikely that its operation now departs substantially from what Congress in 1978 foresaw as the probable outcome of the CSRA.

From most reports, the negotiated grievance process offers a reasonably expeditious way of resolving disputes. Federal arbitrators are gaining a better grip on the complex rules and regulations that confine their discretion. Awards are afforded a degree of finality that, even if it is less than in the private sector, is still substantial. At least some agencies and unions are experimenting with ways to make the system work better, such as use of panels of arbitrators with more expertise in federal civil service law. Suggestions for change are not absent, however.

1. *Judicial Review and Enforcement of Arbitral Awards*

Outside the context of Chapters 43 and 75 actions, the FLRA has exclusive authority to review non-Postal Service federal sector grievance arbitral awards. Several unions favor vesting jurisdiction to review these in the courts and not the FLRA[484] along with direct judicial enforcement of awards.[485] The first proposal is apparently fueled in part by the fact that the FLRA is generally unreviewable when it deals with arbitration awards. Perhaps related to this objection is a perception that the Authority has in the past been overly intrusive in its review (presumably in such cases sustaining agency objections) by reversing an arbitrator where his reasoning may be flawed but the bottom-line result is permissible.[486] Statistics indicate that over the past ten years, unions have filed more exceptions to awards with the FLRA than agencies and yet their rate of success has been much worse.[487] With regard to the second proposal, it is not clear how often agencies, which are bound by statute to give effect to unappealed awards, disregard their obligation in that regard.

From the management perspective, the view expressed by some that arbitrators are not sufficiently faithful to the demands of federal personnel law might suggest that all awards should be directly reviewable by either the MSPB or the courts. Alternatively, the OPM might be granted the right to appeal at least some FLRA decisions relating to arbitrations. Such proposals may be premised on a lack of confidence in the FLRA's ability or willingness to police compliance with applicable law as the Board interprets it, and the fact that arbitration decisions may present important issues of personnel law that require judicial consideration as well as uniformity of treatment. Moreover, the joint jurisdiction over discrimination cases of the MSPB, EEOC, and FLRA presents the potential for confusion by managers regarding applicable personnel rules and forum shopping by employees for favorable personnel law.[488]

While some in management and some unions might find judicial involvement of some sort preferable to the current arrangement whereby only Chapters 43 and 75 awards are reviewed outside the FLRA, it is not clear that both sides would agree which courts should have jurisdiction and under what circumstances, given the differences in their perspectives regarding the problems to be solved or avoided. For example, from the point of view of unity of personnel law, concentrating appeals in the Federal Circuit makes good common sense. To the extent that the focus is on the need to assure the final and binding nature of the results of arbitration, that there is an uneasiness regarding a perceived pro-management approach of the Federal Circuit to personnel and labor relations matters, or that there is a desire for a mechanism to permit development of divergent lines of legal authority so as to facilitate Supreme Court review, review in the district or regional courts of appeal would presumably be an acceptable and preferable approach.

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[484] *Title VII of Civil Service Reform Act of 1978: Hearings Before the Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service*, 100th Cong., 2d Sess. 104 (1978) (statement of Kenneth T. Blaylock, National President, American Federation of Government Employees, AFL-CIO).

[485] *See supra* text accompanying notes 429-30. *See also* Koren, *Adverse Action Arbitration in the Federal Sector: A Streamlining of the Appellate Procedures*, DA Pam 27-50-135 at 38.

[486] *Title VII of Civil Service Reform Act of 1978: Hearings Before the Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service*, 100th Cong., 2d Sess. 135 (1978) (statement of Robert Tobias, National President, National Treasury Employees Union).

[487] *See supra* text accompanying notes 448-52.

[488] *See supra* note 463 and accompanying text. Not knowing whether discrimination will be raised may cause a manager to pause where there is differing MSPB/FLRA precedent.

Recognition that judicial review may provide some valuable benefits suggests that Congress should at least consider substituting judicial for FLRA review of grievance arbitral awards (at least where unfair labor practices are not alleged by the grievant, in which cases the FLRA has greatest expertise) or, alternatively, permitting limited judicial review of the FLRA's disposition of those awards. Eliminating the FLRA from the review process (or adding judicial review on the top of a layer of administrative review), however, will have consequences that must be taken into account. For example, such changes may cause delays in the final resolution of controversies because of courthouse queues. In addition, litigation expenses will increase for all parties due, for example, to the requirement of legal representation in the courts where it does not now exist (as in the case of FLRA review). Agencies would lose the discretion which they now possess to seek review. Presumably, seeking judicial reversal of an arbitral award on behalf of the government will require the consent and participation of the Department of Justice as well as the OPM. Finally, it should be reiterated that available information does not demonstrate that disuniformity in governing legal principles is currently a significant problem created by the FLRA's scope of jurisdiction, though it could become so in the future.

Related to the issue of judicial review of arbitration awards is the matter of enforcement of arbitral decisions. Under existing law, enforcement takes the cumbersome form of filing and adjudicating an unfair labor practice charge before the FLRA. This is the case even when the award relates to Chapters 43 and 75 actions. This method threatens significant delays when one of the important benefits of the arbitration process is expedition. Moreover, the FLRA is forced to divert resources from what are its principal functions: overseeing the representation and collective bargaining processes and adjudicating unfair labor practice complaints that impinge on the heart of those processes.

Therefore, Congress should provide for direct judicial enforcement of grievance arbitral awards in the federal courts. Uniformity in terms of federal personnel law would generally not be at risk at the enforcement stage considered in isolation. Going beyond this limited proposal, consolidation of review and enforcement proceedings in the same judicial forum and occurring at the same time might expedite final resolution of arbitrated controversies. In that case, transferring reviewing authority from the FLRA would seem to have additional support.

2. *Scope of Judicial Review of Arbitral Awards in Non-Mixed Chapters 43 and 75 Actions*

The Federal Circuit's current narrow approach to granting OPM's petitions for review of arbitral awards in Chapters 43 and 75 actions is conditioned in part on deference to the arbitration process.[489] In effect, the court has applied a standard for review and reversal similar to the statutory standard applicable to FLRA examination of arbitral awards.[490] The standard of review expressly established by the 1978 statute with regard to both the MSPB and arbitration—at least in the case of employee appeals—is largely similar to that contained in the Administrative Procedure Act.[491] That standard is allegedly more intrusive than that generally applicable to the results of an arbitration proceeding. There is some reason to suggest, however, that a more deferential standard should be adopted in the case of employee appeals. As a matter of "procedural innovation", imposing APA-type review on public sector labor arbitration creates an animal that is neither fish nor fowl. The courts are likely to ignore the express statutory phrases in favor of the traditional deferential approach to arbitration. Alternatively, they may be entirely confused by the role expected of them.[492] The existing disparity of treatment of the government and the employee might be seen as necessary to fully protect employee rights, including due process considerations.[493] Yet the employee in a Chapters 43 or 75 action has the opportunity initially to choose between the MSPB and the NGP. His or her interests would appear to receive adequate protection given this option, even if the finality of the arbitral process is respected regardless of which party appeals.

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[489] *See, e.g.*, Devine v. Nutt, 718 F.2d 1048, 1052 (Fed. Cir. 1983).

[490] *Id. See also supra* text accompanying notes 422-23.

[491] *Compare* 5 U.S.C. § 7703(c) (1982) *with* 5 U.S.C. § 706 (1982).

[492] *Cf.* Indus. Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974).

It is unlikely that this change would either create substantial incentives for forum shopping or discourage use of the negotiated grievance process for informal resolution of workplace disputes. Given the deferential nature of the existing review of the MSPB, it would seem that employee choice of route would focus more on the structure and expected functioning at the initial hearing stage. While a more deferential scope of review creates the potential for more inconsistency between the results reached by the MSPB and by arbitrators, it is unlikely that the permissible range for inconsistency is increased substantially over that which already exists. Finally, to the extent the results in arbitration are more favorable to employees than those obtained before the MSPB, this additional isolation of the arbitrator from reversal is unlikely to adversely affect employees in a practical sense.

In short, a substantial argument exists in favor of amending the CSRA to impose a uniform scope of review applicable to arbitration awards, including Chapters 43 and 75 matters. That scope should be similar to that currently applied by the FLRA in non-Chapters 43 and 75 matters. Such a standard would not prevent the courts from enforcing uniformity between the MSPB and arbitral processes with regard to the statutorily mandated procedures and the substantive rules applied.

3. *Judicial Review of Non-mixed Chapters 43 and 75 Arbitral Awards at Goverment Request*

Judicial review at government request, whether of MSPB decisions or arbitral decisions, in Chapters 43 and 75 matters should be conditioned now and in the future on error in the interpretation of civil service law having a "substantial impact". This proposition is supported by a need for expedition and finality in resolving employee disputes. Because of potential constitutional problems, those needs cannot be achieved by a similar limitation when an employee loses in the administrative process and seeks judicial intervention.

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[493] *Cf.* Devine v. White, 697 F.2d 421, 434-35 (D.C. Cir. 1983).

The "legal error/substantial impact" test is not always easy to apply, though it captures within its confines the appropriate type of case where judicial intervention is most defensible. The recent decision in *Horner v. Garza*,[494] however, raises a crucial issue: how should the standard for review be construed to apply when the congressionally mandated uniformity between MSPB and arbitration processes is squarely at issue? As noted previously, the *Garza* court's refusal to grant an OPM petition, when an arbitrator has clearly not followed rules equally applicable to the MSPB and arbitration, will mean either that such uniformity may not be obtained or that only the FLRA will be in a position to do the job that Congress gave to the Federal Circuit.[495] In short, either the Federal Circuit or Congress should expressly repudiate *Garza*.[496]

B. Appeal Routes

1. *Choice Between NGP and MSPB Process*

As noted previously, with regard to Chapters 43 and 75 actions (even those not involving discrimination), a statutory right exists to avoid the negotiated grievance process and file an appeal directly with the Merit Systems Protection Board.[497] One possible modification would be to eliminate this option. At the current time, however, this would be inadvisable for a variety of reasons.

First of all, it must be recognized that even if this choice were eliminated, it would not have an impact on employees who are not members of bargaining units or on employees whose collective bargaining agreements exclude Chapters 43 and 75 matters from the NGP. Thus, the MSPB process must be kept in place for these individuals.

With regard to unit members, the available statistics do not demonstrate exactly how many exercise their choice for the MSPB over the NGP process. All they show is that there are many more

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[494] 832 F.2d 150 (Fed. Cir. 1987). *See supra* text accompanying notes 424-30.

[495] *See supra* text accompanying notes 430-31.

[496] Horner v. Garza, 832 F.2d 150 (Fed. Cir. 1987) expresses an approach that is hard to square with the Federal Circuit's reasoning in Devine v. Nutt, 718 F.2d 1048, 1053 (Fed. Cir. 1983), *rev'd sub nom*, Cornelius v. Nutt, 472 U.S. 648 (1985).

[497] *See supra* text accompanying note 204.

Chapters 43 and 75 actions decided by the MSPB than are decided by arbitrators.[498] Given the number of federal employees that belong to unions and the scope of most grievance procedures,[499] and in view of the magnitude of the discrepancy between the numbers of Chapters 43 and 75 actions decided by arbitrators in the NGP each year and the volume adjudicated by the MSPB, it is probably true that the MSPB is the preferred route even for unit members. The likely reasons for this preference suggest that the statutory choice continues to make sense from an employee's point of view: the union controls access to arbitration; the arbitral proceeding may often lack the procedural protections and opportunities (such as discovery) found at the Board; and unit employees who are not dues-paying members of the union (and even some that are) may not entirely trust the union to faithfully protect their interests in what are, after all, the principal adverse personnel actions.

The first two reasons implicate difficult and unresolved constitutional issues regarding the degree to which the federal government could consign exclusive adjudicatory responsibility in employee performance and disciplinary actions to the arbitral process as it is currently structured.[500] Such problems might be solved, of course, but with the possibility of some serious consequences. For example, elimination of the union's right to choose whether or not to invoke arbitration could undercut the ability of the arbitral process to serve as an efficient and effective method of dispute resolution,[501] as well as impose costs on unions that could only be met if Congress authorized imposition of a representation fee on employees included within bargaining units. Moreover, even if current arbitral procedures meet due process requirements, to provide employees in the arbitration arena procedural protections similar to those afforded by the MSPB may so change the nature of arbitration that it can no longer serve the function envisioned by Congress and union proponents in 1978. In the process, the overall cost of dispute resolution for all involved—employee, government and union—might increase substantially, particularly since the MSPB must remain in business for non-unit members.

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[498] *See supra* text accompanying notes 384-92.

[499] *See supra* note 384.

[500] *See generally* Comment, *Public Sector Grievance Procedures, Due Process, and the Duty of Fair Representation*, 89 HARV. L. REV. 752 (1976). For example, if the union chooses not to go to arbitration, are due process "hearing" requirements abridged? *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Arnett v. Kennedy, 416 U.S. 134 (1974).

[501] Comment, *supra* note 500, at 784.

It may, moreover, be a distinct advantage from the union's point of view for employees to have an option other than the NGP. With only one forum open to a unit member, a union might be particularly fearful that a refusal to take a case to arbitration would result in its own liability to the employee on the basis of lack of fair representation or otherwise. Further, would employees vote for union representation[502] if it meant foreclosing appeal options, particularly since federal unions lack the power to bargain over such important issues as wages and thus do not offer some significant benefits in return for the surrender of procedural options?

2. *Choice Between the NGP and the Statutory Process for Discrimination Complaints*

In considering retention of the current right to opt out of the NGP in EEO matters at the beginning of a case (as opposed to the stage when an arbitral award has been entered) and pursue administrative statutory avenues, the existence of the right to trial *de novo*[503] in the district courts, either as an alternative or as a supplement of non-judicial remedies must be considered at the outset. Such a right does not presently exist in cases where discrimination is not an issue, the administrative and arbitral remedies with limited judicial review being the only ones available.

Available statistics do not indicate clearly how often a federal employee resorts to the courts in order to vindicate his or her statutory rights to be free of discrimination in personnel matters, though there appear to be less than nine hundred of these cases filed each year.[504] Despite the fact that the district court has the authority in these cases to appoint counsel for plaintiffs and award attorneys' fees, the judicial arena may appear intimidating to potential plaintiffs and the stakes at issue may not be that large in many cases. Accordingly, the option may only be theoretically available. The possibility that the non-judicial process is the only realistic route for many employees suggests caution in limiting unit employees to arbitration, albeit with a right to later resort to the courts.

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[502] In the federal sector, the Supreme Court recently held that fair representation claims cannot be the basis for a private cause of action in the federal courts but must be pursued through FLRA unfair labor practice proceedings. *See* Karahalios v. Nat'l Fed'n of Fed. Employees, ____U.S. ____, 109 S. Ct. 1282 (1989).

[503] *See supra* text accompanying notes 202, 208, 210.

[504] Source: Administrative Office of U.S. Courts.

In addition to reasons that are perhaps distinctive in the discrimination cases,[505] factors similar to those that push ordinary Chapters 43 and 75 actions into the administrative routes[506] may operate with regard to EEO matters. The same constitutional and other difficulties[507] that would attend vesting exclusive jurisdiction in the NGP, though, might either not be present or be present but not to the same extent. In fact, the more the EEO process is improved, the more resistance to eliminating options is likely to arise.

It should be noted that at least one agency, the Department of Health and Human Services, has analyzed the costs of EEO processing from its own point of view and has concluded that it would be less costly to process these matters through the grievance machinery. Accordingly, one of its collective bargaining agreements with the National Treasury Employees Union creates incentives for the union to take these matters to arbitration. The agency has agreed to pay seventy percent of the costs of arbitration, and the procedures for fact discovery and record production have been enhanced. However, while these arrangements are worthy of study by other agencies and unions, it is questionable whether individual employee options should be limited without some assurance that the same types of protections will be negotiated in other cases. Yet, requiring that such modifications be made in the arbitral process as it applies to ordinary EEO matters raises some of the political and other difficulties that may confound similar tinkerings with the process as it applies in ordinary Chapters 43 and 75 actions.[508]

In addition, with regard to mixed cases that involve Chapters 43 and 75 actions, it would be difficult to defend a proposal consigning those actions exclusively to the NGP process with a right to trial *de novo* in the district courts while employees involved in Chapters 43 and 75 actions that do not contain allegations of discrimination could choose the NGP or the MSPB process. This proposal might be seen as a disguised attempt to discourage raising discrimination claims, and it might in fact operate in that fashion. Futhermore, any proposal, such as eliminating resort to the statutory processes, presenting the possibility of increasing docket congestion in the federal courts must be scrutinized closely, given the existing workload of federal judges.

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[505] *See supra* text accompanying notes 436-39.

[506] *See supra* text accompanying notes 431-35.

[507] *See supra* text accompanying notes 500-01.

[508] *Id.*

Finally, the fact that the administrative processes for EEO matters appear to be the overwhelming choice today bodes ill for any proposal that seeks to modify the current statutory structure by eliminating the option to choose the statutory over the NGP route for unit members. In short, the existing right of a unit employee to choose the statutory over the NGP route in discrimination cases (both mixed cases and others) should be preserved. Future improvements of the EEO process in terms of quality and expedition of decision-making will likely further solidly support in favor of retaining this option.

3. *Appeal to the MSPB and EEOC from the NGP in Discrimination Cases*

Where discrimination is alleged and an NGP covers discrimination claims, unit employees may obtain MSPB "review" of arbitral awards and FLRA decisions in mixed cases[509] and EEOC "review" of agency, arbitrator, and FLRA decisions in other instances.[510] While conceivably both the MSPB and EEOC might have taken the position that they could conduct a searching review for factual and legal error and also order record supplementation in appropriate cases, neither has done so. Rather, by adopting to a great extent the traditional deference exercised by reviewing bodies with respect to arbitral awards, both the MSPB and EEOC accept the record created below and examine largely for errors of legal interpretation.[511] Unless the federal sector arbitration process is to be transformed into a system bearing little resemblance to that found in the private sector, that result was a foregone conclusion.

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[509] The MSPB will not review an agency decision on a grievance filed in the NGP. *See, e.g.*, Parks v. Smithsonian Inst., 39 M.S.P.R. 346 (1988); Gillman v. Dept. of the Air Force, 7 M.S.P.B. 192 (1981). This approach might be criticized because of the inability of the employee on his or her own to invoke arbitration. It might be argued, however, that one of the risks of taking the grievance route is the refusal of the union to go to arbitration. As long as the employee is thus advised so that he or she can opt initially for the MSPB/EEO process, this approach may make sense because the record for review where there is only an agency decision on a grievance is likely to be almost nonexistent.

[510] *See supra* notes 181-210.

[511] *See supra* text accompanying notes 207, 210. *But cf.* Marenus v. Dep't of Health & Human Serv., 39 M.S.P.R. 498 (1989) (where Board modified arbitration decision finding, *inter alia*, that appellant had not established a prima facie case of handicap discrimination).

To date, relatively few requests for review have been received by either agency.[512] To some extent this may be attributable to lack of notice to the employee in the arbitrator's decision or otherwise regarding the right to further proceedings.[513] (Where an EEO complaint is processed through the employing agency and outside the NGP, a formal notice of the right to take the matter to the EEOC is expressly afforded.[514]) At the same time, most EEO matters appear to be processed currently outside the negotiated grievance process and this situation is unlikely to change to any significant extent, at least in the short term. Given the variety of considerations impacting the choice of the statutory processes over the NGP in the discrimination context, the absence of the opportunity for a limited appeal from the NGP to the MSPB or EEOC probably will not contribute significantly to the forum choice. Moreover, the employee who chooses to prosecute a discrimination case through the NGP will retain any rights that currently exist under the CSRA to sue *de novo* in district court.[515]

If parity of treatment with non-federal employees protected by the anti-discrimination statutes is desired, the proposal to eliminate the right to obtain MSPB and EEOC review can still be justified with relatively minor additional statutory changes. Currently, non-federal employees, both in the public and private sectors, can prior to suit in the federal courts, invoke the efforts of the EEOC to investigate charges of discrimination and, if there is reasonable cause to believe that the charges are well-founded, engage in informal "conference, conciliation, and persuasion."[516] Rather than affording federal employees a limited opportunity for third-party involvement at the end of the arbitration process, where it may have little practical value, Congress could mandate that collective bargaining agreements, whose negotiated grievance processes encompass claims of discrimination, must provide for investigation and mediation by third-party neutrals at the request of the employee at the pre-arbitration stage. Currently, unless a collective bargaining agreement provides otherwise, employees opting for the NGP in a discrimination matter lose all of the benefits of the EEO agency process other than counselling.[517] The statutory modifications suggested would reduce this discrepancy between the two appellate routes and, as a side benefit, eliminate one of the incentives to avoid the NGP, which may be more expeditious and cheaper for all parties as a way to deal with discrimination cases.[518]

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[512] *See supra* text accompanying notes 340, 375-77.

[513] *See infra* note 600.

[514] *See, e.g.*, 29 C.F.R. § 1613.221(e) (1988).

[515] *See supra* note 273 and *infra* text accompanying note 519.

[516] *See* 42 U.S.C. § 2000e-5(b) (1982).

Whether or not this change is adopted, Congress should specify that any required exhaustion of non-judicial remedies occur at the time the agency issues its decision on an employee grievance or, if the union invokes arbitration, at the time the arbitral decision is issued. Along the way it should also eliminate existing uncertainty in some quarters and provide expressly that opting for the NGP does not constitute a waiver of the right to trial *de novo* in the district court.[519]

There may be some concern that the proposal to limit the opportunity for EEOC review will result in splitting claims. In defense of a personnel action, an employee may raise both discrimination and other issues, such as violation of civil service rules. Generally speaking, the latter issues will not be resolved in the EEO process. For bargaining unit employees, the NGP may be the only process with jurisdiction to examine all related matters. Addressing this problem in part, EEOC regulations currently specify that once the grievance process has been invoked, even if no claim of discrimination has been raised, later filing of an EEO complaint regarding the same "matter" must be rejected and the employee informed that he or she should pursue the discrimination claim in the NGP.[520] This provision, however, does not deal with the situation where the EEO complaint is filed first and later the non-discrimination aspect of the case is presented in the context of the grievance process.

If the option to appeal to the EEOC in discrimination cases is eliminated, would this result in more spitting of claims and the inefficiencies and confusion that may ensue, on the argument that employees will have a greater incentive to file first in the EEO process rather than take the whole case to the NGP? As noted earlier, most discrimination claims appear now to proceed through the statutory process anyway and it is unlikely that elimination of the appeal option will by itself change this situation. Improvement of the NGP in terms of its capacity to assist the employee in investigating the merits of an EEO matter prior to arbitration can only encourage consolidation of all issues in the NGP. It should also be noted in this connection that currently with regard to non-bargaining unit employees and those bargaining unit employees whose NGP does not encompass discrimination claims, splitting of discrimination and non-discrimination aspects of a personnel action between, for example, the agency administrative grievance system and the EEO process may be required. The bottom line appears to be that the proposed elimination of review by the EEOC and the MSPB of the results of the NGP is unlikely to create problems or aggravate existing ones.

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[517] *See* 29 C.F.R. § 1613.219(b) (1988).

[518] *See supra* text accompanying notes 507-08.

[519] *See supra* note 273.

[520] *See* 29 C.F.R. § 1613.219(b) (1988).

4. *The Right to Trial De Novo in Discrimination Cases*

Under present law, federal employees may obtain a trial *de novo* in United States District Court on allegations of employment discrimination where the administrative and arbitral processes have not provided requested relief. In one respect, this option raises significant issues. In mixed cases, an employee may avail himself or herself of a full trial-type hearing at the MSPB (including subsequent EEOC and Special Panel review) and, if unsuccessful, obtain a second *de novo* adjudicatory hearing in the district court on the discrimination claim. While the same substantive anti-discrimination protections apply to employees in the public and private sectors, it is only federal employees that have the right to two full hearings on the same claim.

Relieving parties of the cost and vexation of multiple lawsuits, conservation of judicial and other resources, and permitting reliance on adjudication as a final resolution of controversies underlie the common law doctrines of preclusion that generally bar suing two or more times on the same claim.[521] Moreover, current budgetary constraints and docket congestion in both administrative and judicial fora provide additional support in favor of the application of the principles of claim preclusion absent extremely compelling circumstances.

These general policies and concerns that appear equally applicable in the discrimination context, as indicated by recent Supreme

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[521] *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982).

Court precedent,[522] suggest that where an employee has been afforded a full trial-type hearing before the MSPB in a mixed case, he or she should be entitled only to the limited judicial review generally applicable to administrative determinations and not the full trial *de novo* currently permitted. This assumes that the administrative procedures would afford a fully adequate opportunity to litigate all relevant matters that are to be precluded.

In order to implement this proposal, Congress must revise the relevant statutes. Operation of the common law of preclusion is now foreclosed in part by various provisions of the CSRA and the anti-discrimination statutes as construed by the courts.[523] For clarity's sake, the statutory amendment should indicate expressly that an employee in a mixed case has the right to an MSPB hearing or a judicial trial *de novo* but not both. The scope of preclusion should extend in this context, as it does normally, to matters that could have been but were not raised[524] before the MSPB to avoid splitting a claim with the personnel side adjudicated by the MSPB and the discrimination issues by the district court where much the same evidence may be relevant to both.

For many matters of extreme importance to individuals—other than discrimination—Congress has deemed an administrative adjudication followed by limited judicial oversight to be sufficient protection for the interests at stake.[525] If few people currently resort to court after an unsuccessful administrative trial, elimination of a trial *de novo* may adversely effect few employees. If, on the other hand, dual proceedings are more common, substantial savings may result from elimination of this option.

The opportunity for some administrative investigation and consideration of the merits of a mixed case prior to filing suit in the federal courts has much to recommend it and this is generally mandated in the case of both public and private sector employees. Requiring initial resort to a process that provides for the investigation of a claim and an attempt at its informal resolution permits the agency whose action is questioned to remedy the claim on its own without the intervention of outside authorities and, to the extent a settlement of the dispute is arrived at, to conserve party and judicial resources. The effectiveness of the process may turn on the involvement of a neutral third party to assess the merits, make recommendations, and facilitate settlement discussions. The EEOC now has the authority to adopt procedural regulations to require this type of informal dispute resolution and in fact its existing regulations establish at least the foundation for this type of process.[526] Some modifications, such as requiring involvement of a neutral third party, would be appropriate for those mixed cases where employees intend to avail themselves of the option of suing *de novo* in district court. Where an employee does not choose the MSPB or NGP processes for adjudication of a mixed case, he or she should have to exhaust the method provided by the EEOC's regulations applicable to informal dispute resolution of mixed cases prior to resort to federal district court for a trial *de novo*[527] except in the case of an age discrimination complaint (where the relevant statute does not require exhaustion).

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[522] *See, e.g.*, Kremer v. Chem. Const. Corp., 456 U.S. 461 (1982); Allen v. McCurry, 449 U.S. 90 (1980). *But see* Univ. of Tenn. v. Elliott, 478 U.S. 788 (1986).

[523] *See, e.g.*, Chandler v. Roudebush, 425 U.S. 840 (1976). *Cf.* Elliott, 478 U.S. 788.

[524] *See* Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984). *Cf.* Spears v. MSPB, 766 F.2d 520 (Fed. Cir. 1985).

[525] *See, e.g.*, Fair Housing Amendments Act of 1988, Pub. L. 100-430, § 8, 102 Stat. 1629-34 (1988) (choice between administrative hearing on a housing discrimination practice claim and a district court proceeding).

Under current EEO regulations, an employee complaining of discrimination with regard to an action that is not appealable to the MSPB cannot invoke a quasi-judicial proceeding equivalent to that of the MSPB. For example, in the current EEO process, a hearing may be held by an EEOC administrative judge but the administrative judge's findings can be rejected by the agency.[528] Also, under the negotiated grievance process, absent union request, an arbitral hearing is not at all available and, even if requested, is relatively informal. Accordingly, the right to ask for a *de novo* judicial proceeding following exhaustion of the EEOC or NGP route should be retained, even if it is only of theoretical value for many employees.[529] For similar reasons, an employee pursuing a mixed case through an NGP should not forfeit the right to a later trial *de novo* in district court.

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[526] *See supra* 29 C.F.R. subpart D (1988) and *supra* text accompanying notes 198-99.

[527] This appears to be required by existing law. *See* 5 U.S.C. §§ 7702(a)(2), (e)(1)(A) (1988).

[528] On October 31, 1989, the EEOC proposed revised federal sector regulations which attempt both to expedite final dispositions of EEO matters and eliminate the conflict of interest presented by agency power to reject recommended decisions. For example, the hearing of right before an EEOC administrative judge will come after, rather than before, the agency decision on an EEO complaint. See 54 Fed. Reg. 45,747, 45,748 (Oct. 31, 1989).

[529] This is the case outside the federal sector and, in part, for the same reasons mentioned in the text. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

5. *Judicial Review in Mixed Cases*

It bears reiteration here that mixed cases are those involving personnel actions of the type that generally fall within MSPB jurisdiction and involve claims of prohibited discrimination of certain kinds.[530] They may be Chapter 43 or Chapter 75 actions or others, such as within-grade pay denials or reductions-in-force. The retention of the statutory option for discrimination matters allows, for example, that all mixed cases—even those that are, absent discrimination, within the exclusive scope of a NGP and FLRA jurisdiction—may be brought before the MSPB as an initial matter. In addition, the statutory right to trial *de novo* in district court at the insistance of an employee applies today regardless of the appeal route chosen, though some agencies take the position that selection of the NGP constitutes a waiver of this right.[531] Accordingly, following MSPB adjudication or arbitration of a mixed Chapter 43 or Chapter 75 case, an employee suit can now be brought in federal district court, though not the Federal Circuit that has jurisdiction only in non-mixed Chapters 43 and 75 actions.[532]

Under the "one shot" approach suggested above,[533] where a personnel action allegedly infected with prohibited discrimination is adjudicated by the MSPB, the employee should forfeit the right to a *de novo* proceeding in the district court. Instead, the employee should be afforded the type of limited-scope judicial review of findings of fact and law afforded by the Administrative Procedure Act,[534] or perhaps somewhat more searching judicial scrutiny on the fact findings relevant to the discrimination issue. This proposal dictates that non-bargaining-unit members should have the choice of going directly to the district courts for a *de novo* trial in mixed cases following exhaustion of special administrative remedies[535] or litigating through the MSPB administrative process, but not both. For those bargaining unit employees whose negotiated grievance process encompasses discrimination claims, they should be able to choose between a trial *de novo* in district court (following exhaustion of special administrative remedies[536] or the NGP process[537]) and an MSPB hearing, but not both.

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[530] *See supra* text accompanying notes 218-20.

[531] *See supra* text accompanying notes 503-08.

[532] *But see infra* notes 576-78.

[533] *See supra* text accompanying notes 521-25.

[534] *See* 5 U.S.C. § 706 (1988).

[535] *See supra* text accompanying notes 526-27.

Currently, judicial review in mixed cases takes place in the district courts in oddly structured proceedings where the court conducts a fully *de novo* proceeding (both as to record and scope of review) on the discrimination issue and a limited record and restricted scope of review on the personnel issues (where there has been prior MSPB adjudication). The decision of the federal district court is then appealable only to the United States Court of Appeals whose circuit embraces that district.[538]

Under the proposals made here, where an employee has chosen not to have an MSPB hearing, the type of bifurcated review prevailing at the district court level can be abandoned. Where any available NGP process has not been invoked, the district court should hold a fully *de novo* proceeding, applying MSPB substantive law on the personnel side and the type of procedural rules pertaining to such matters as burden of proof that are demanded by discrimination law. If the discrimination issue is disposed of unfavorably to the employee, the personnel aspect of the case should be analyzed as consistently as possible with the burdens of persuasion that would otherwise apply in an MSPB proceeding, e.g., a lesser burden on the agency in a Chapter 43 action.[539] If, however, the NGP has been invoked and there has been an arbitral award, the district court should give as much deference to the arbitral findings on the personnel side as is appropriate without undercutting the plaintiff's right to a full *de novo* proceeding on the discrimination issue.[540] At least in Chapters 43 and 75 actions, MSPB substantive rules should control on the personnel side. In these ways, forum shopping may be discouraged and some degree of uniformity between MSPB, arbitral, and district court processes achieved, as was intended by Congress in 1978.

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[536] *See supra* text accompanying notes 525-27.

[537] *See supra* text following note 518. As noted previously, an employee has no right to arbitration and any arbitral proceeding is usually informal. Accordingly, preclusive effect is not appropriate.

Under current law, a collective bargaining employee can opt out of the NGP in a mixed case and, like non-unit members, file either an appeal directly with the MSPB or a mixed complaint with his or her agency and, following the agency decision on the mixed complaint, *see supra* text accompanying notes 198-99, file directly in district court. *See* 5 U.S.C. § 7702(a)(2) (1988).

[538] *See* Williams v. Dep't of the Army, 715 F.2d 1485 (Fed. Cir. 1983).

[539] *See supra* text accompanying notes 396-98.

[540] *See supra* text accompanying notes 489-93. This approach is consistent with *Gardner-Denver*, 415 U.S. 36.

The legislative history of both the 1978 CSRA[541] and the 1982 Federal Courts Improvement Act,[542] the latter of which created the federal circuit, clearly indicates a concern for the unity of federal personnel law. Moreover, the CSRA incorporates various special mechanisms to ensure that at least those Chapters 43 and 75 actions that do not involve allegations of discrimination are treated uniformly.[543] One mechanism is the provision for judicial review of both MSPB and arbitral decisions (outside the mixed case context) in the federal circuit. Regional circuit review in mixed cases may substantially undercut the ability to achieve these goals.[544]

The complexity of the statutory scheme established in 1978 and the fact that the 1982 legislation had a broad focus not confined to the civil service area suggest that Congress may not have directly confronted the question of whether the goals of uniformity in personnel law and in treatment of employees involved in Chapters 43 and 75 actions are less deserving of protection in mixed than in MSPB appealable non-mixed cases.[545] If those goals are of preeminent importance, the CSRA should be amended to provide for judicial review at employee request of MSPB and district court decisions in mixed cases in the federal circuit. A concern for uniformity in at least the basic elements of personnel law can be defended on various grounds, including, mitigation of managers' uncertainty regarding the limits on their discretion in dealing with employee problems, reduction in confusion suffered by employees in deciding which appellate route to take, and avoidance of discrimination in legal treatment between similar cases where there is a lack of adequate justification.

To the extent that under the recommendations made here an employee must choose between a full trial-type hearing at the MSPB and one in the district court, there must be some concern for eliminating inappropriate incentives to forum shop. This was another concern that underlay the design of the 1978 CSRA which permits bargaining unit employees to choose between the MSPB and NGP processes in Chapters 43 and 75 actions. Accordingly, the scope of judicial review of MSPB and district court decisions in mixed cases should be the same or as nearly identical as feasible. In addition, as will be discussed below,[546] where the government loses at the MSPB level, the opportunity for it to obtain direct judicial review should be limited to instances where the Board erred in interpreting civil service law and the decision will have a substantial impact. This limited right of review helps to expedite final disposition of cases. These same limits should be applied to the government's right to seek appellate review in the instance of district court disposition of mixed cases.

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[541] *See* 1978 S. Report, *supra* note 70, at 62-63.

[542] See S. Report No. 13.4-275, 97th Cong., 2d Sess. (1982).

[543] *See, e.g.*, 1978 S. Report, *supra* note 70, at 111.

[544] In 1978, judicial review of the MSPB in non-mixed cases was placed within the jurisdiction of the regional circuits, allegedly for uniformity purposes, *id*. at 63, though the district courts were to retain jurisdiction in discrimination cases. *Id*. However, in 1978, the choice of the Federal Circuit was not available and the Senate did not address directly the question of which circuit should hear appeals from the district courts in EEO matters.

[545] *But cf. Williams*, 715 F.2d at 1496-97 (Bennett, J., dissenting) (suggesting that the 1982 Federal Courts Improvement Act's concern for unity of personnel law pointed to Federal Circuit review in mixed cases). *See also* Dep't of Treasury v. FLRA, 58 U.S.L.W. 2170, No. 88-1159 (D.C. Cir. 1989) (emphasizing MSPB "primacy" in personnel law and the Federal Circuit as the device to ensure uniformity).

6. *Administrative Jurisdiction in Mixed Cases*

This brings us to one of the most difficult issues: should the responsibility for administrative adjudication of mixed cases be vested in the MSPB or the EEOC or both to some degree? Currently, mixed cases are funnelled through the MSPB, involving the EEOC only when the employee petitions for EEOC consideration of an MSPB final decision.[547] The available statistics do not establish that the MSPB process is substantially less likely to result in a finding for an employee in a discrimination case than the EEOC process as currently structured.[548] Moreover, over the years, it has been comparatively rare for the EEOC to differ with the Board regarding the latter's conclusions on discrimination issues presented in mixed cases.[549] The interpretation of the statistics here may be disputed for a variety of reasons,[550] though at a minimum they should cause hesitation in concluding that continued EEOC involvement in mixed cases is necessary in order to give adequate protection to equal employment opportunity goals. The delays and confusion plaguing the mixed-case process over the years[551] suggest caution in concluding that the existing statutory scheme for shared

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[546] *See infra* text following note 579.

[547] *See supra* text accompanying notes 224-27.

[548] *See supra* text accompanying notes 362-72.

[549] *See, e.g., supra* text accompanying notes 341-46. It might also be argued that the possibility of EEOC review has kept the MSPB on the "straight and narrow."

[550] *See supra* text accompanying notes 347-49, 374.

[551] *See supra* text accompanying notes 236-70.

MSPB/EEOC involvement should be retained. This is true even if the right to proceed *de novo* in district court is eliminated for those employees who proceed through the administrative process.

a. Option 1: Exclusive MSPB Jurisdiction

If the design of an appellate system to handle mixed cases could be arrived at without regard to the baggage of history and the political crosscurrents that have or may control, vesting administrative jurisdiction solely in the MSPB would seem eminently sensible. After all, the Board's expertise lies in the personnel area. Mixed cases call for a fine appreciation for not just EEO law but also the complicated web of personnel law. In fact, the crux of mixed cases is often the personnel side as the agency asserts and the complainant tries to question the official reasons for the action. Moreover, unless the EEO process is substantially revamped, the MSPB process today offers many advantages over the EEO framework: it is faster, independent of the employing agency, and the judicialized procedures protect the employee.[552] And even if the EEO process is ultimately changed to mitigate its current perceived weaknesses, it is far from clear that the new framework would necessarily be superior to the MSPB from the employee's point of view.

Certainly, the EEOC has over the years accumulated significant experience in the application of federal personnel law. If mixed cases remain outside its jurisdiction, the EEOC will continue to be confronted by personnel law issues in the context of the ordinary EEO process. However, it would be hard to maintain that it is better equipped than the MSPB with regard to its knowledge of existing and developing personnel principles. While the dispersal of the major performance and disciplinary actions between the MSPB and NGP may create some risk of less than fully informed decisions in the area of personnel law by arbitrators and there is no support for the proposition that the EEOC (including its hearing officers) is less expert in this regard than arbitrators, fragmentation of responsibility for the major performance and disciplinary actions (along with other personnel matters such as reductions-in-force) can only be justified if substantial benefits are likely to be obtained.[553]

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[552] EEOC is currently proposing significant revisions to its federal sector regulations. *See supra* note 528.

b. *Option 2: Concurrent MSPB/EEOC Jurisdiction*

One alternative to exclusive Board jurisdiction is to vest concurrent jurisdiction in the MSPB and EEOC in mixed cases. This would ensure parity between the two agencies and allow the employee to choose whichever forum he or she believes more favorable. The option obviously expands EEOC authority beyond that contemplated by Congress in 1978 but, by itself, that certainly is not objectionable. There are, however, various administrative problems posed by this approach, many of which are directly traceable to the difficulties of identifying a case as mixed at the time of filing, particularly for *pro se* claimants who today constitute a large portion of the MSPB's appellants and probably the majority of those using the EEO process.

At the outset, the nature of the "mixed case" must be noted. A mixed case may involve a controversy wherein the employer purports to justify its action by reference to performance inadequacies or allegedly service-connected conduct, e.g., the commission of a crime. The employee's defense may be premised solely on the argument that the agency's explanation masks a discriminatory motive. In other cases, the employee may not only raise the discrimination argument but may also contend that, even if discrimination was not present, the agency's action is not supported by documented performance inadequacies or other conduct. As is clearly evident and as recognized by Congress in 1978, the mixed case presents two sides of the same coin, thereby creating substantial difficulties and diseconomies in trying to resolve it in two separate proceedings.

Under the concurrent jurisdiction scenario, if an employee files first in the MSPB process without initially presenting a claim of discrimination but later raises such issues, should the opportunity to choose between the MSPB and EEO routes be reactivated so as to allow a mid-course change of forum? It is not uncommon today for discrimination charges to be added late at the MSPB and currently provision is made in appropriate cases for their consideration. The fact that many employees are not represented by attorneys magnifies the likelihood of failures to present claims of discrimination at the outset. However, allowance of mid-course changes to accommodate the disadvantages suffered by appellants (whether or not represented by counsel) may substantially increase the costs of adjudication for all parties since the effort and expenses already invested may have to be duplicated on the change of forum.

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[553] That jurisdictional choice turns in part on the MSPB "appealability" of the personnel action at issue raises the possibility of "ping-pong" matches between the MSPB and EEOC. *see supra* note 188, though this problem seems to be a relatively minor one today. One solution might be to require a case filed in the ordinary EEO process to be stayed on agency request for MSPB determination of its jurisdiction.

If the employee files first in the EEO process under a mistaken notion that unlawful discrimination is implicated and the complaint is dismissed early on (as in the manner of Rule 12(b)(6) dismissal under the Federal Rules of Civil Procedure), after a hearing, or somewhere in between, should the employee be able to take any purely personnel law objection to the agency action (e.g., in a Chapter 43 removal, that his or her performance was fully adequate) to the MSPB? If so, the interrelationship of the personnel and discrimination claims that is typical of mixed cases will often mean that much the same evidence will be presented both in the EEO process and at the Board. Based on available statistics indicating the relative infrequency of findings of discrimination in the EEO process, this duplication is likely to be a very common occurrence—unless employees are exhausted by the time the EEO process reaches its terminal point and choose not to proceed further.

This second problem could be eliminated by a provision to the effect that once the EEO route is selected, the employee can prevail only on the discrimination claim and will be deemed to waive any purely personnel law matters. Currently, EEOC does not have the authority to deal with the purely personnel aspects of a case but the MSPB, like the NGP, can deal with all issues raised. The employee in these circumstances has a choice, but it will have to be made with great circumspection and with potentially disastrous results. The potential unfairness of this scheme to the employee will be explored further below.

Turning to other types of difficulties posed, it is very possible that joint jurisdiction in mixed cases will result in the application of different rules of personnel and discrimination law, depending on the forum chosen for the action. Since today there is no opportunity for direct judicial review of EEOC decisions by the government and government relitigation of both the factual and legal aspects of an EEOC finding in favor of a complainant may be foreclosed in the district court,[554] the potential for forum shopping and discrimination in terms of different rules applied is substantially increased.

From an employee's point of view, the multiplication of appeal routes may appear to be an improvement of sorts. In order to make an intelligent choice, however, employees must be clearly informed at some point regarding the procedural (if not the substantive) differences between the MSPB and EEO processes. The available statistics relating to the MSPB in mixed cases and the EEO process in non-mixed cases suggest that in relatively few cases does an employee succeed in proving discrimination. Both those statistics and the impressions gathered during the interviewing process leading to this article suggest that many employees fervently believe that there has been discrimination where it either does not exist or may be difficult to prove. Add to all this the fact that many employees in both the MSPB and EEO processes proceed *pro se*, and there is some question whether it is reasonable to expect that employees can make adequately informed decisions regarding the best forum for their cases. Their dilemma would be considerably heightened to the extent that choice of the EEO process constitutes a waiver of the purely personnel law matters they could raise in the MSPB process.

In short, joint MSPB/EEOC jurisdiction may present deceptively simple choices for a large class of employees. However, ultimately, they may forfeit the opportunity to a full, timely, and consolidated trial of all of their contentions.

c. *Option 3: Exclusive EEOC Jurisdiction*

A final option is to vest exclusive jurisdiction over mixed cases in the EEOC. This would simplify matters considerably. However, the current EEO process is afflicted with a variety of problems, including lack of resources and delays, some of which may not be remedied at least in the short term.[555] To force employees into this route is not likely to be perceived as fair. Moreover, many of the same or analogous problems that accompany vesting mixed case jurisdiction in both the MSPB and the EEOC are presented by this option, e.g., the employee will have to consider whether or not to raise any discrimination claim based on perhaps incomplete understanding of the procedural and other consequences.

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[554] *See* Moore v. Devine, 780 F.2d 1559 (11th Cir. 1986).

[555] *But see supra* note 552.

There are in fact ways to improve the attractiveness of a proposal to vest exclusive adjudicatory jurisdiction in mixed cases in the MSPB. Perhaps with congressional ratification, MSPB could relax its focus on the 120 day deadline that may interfere with the ability of the employee to develop his or her case on the discrimination issues. Presiding officials should make particular efforts to assist *pro se* appellants, particularly in the area of factual discovery. Such efforts may not be entirely lacking today on the part of at least some administrative judges.[556] The burdens of proof in Board proceedings in mixed cases must be modified to accord more closely with those applicable in the district courts in discrimination cases (something that may require some legislative tinkering). More emphasis might also be placed on educating Board presiding officials on various aspects of discrimination law, including its nuances and the factual patterns suggesting the existence of discriminatory motive. Pronouncements and decisions by the Board could trumpet the fact that principles of discrimination law are not a "hostile" outsider but are part and parcel of personnel law and must be implemented accordingly throughout the Board's various decision-making processes.[557]

Finally, a way to institutionalize some formal involvement by the EEOC in the mixed case process should be explored. The EEOC might be authorized to intervene in MSPB proceedings presenting issues of discrimination law and petition for judicial review of such cases. EEOC rights in these regards could be limited in the same manner as the OPM's current opportunity for involvement with Board cases.[558] Alternatively, they might be more broadly defined to include, for instance, the right to judicial review.

To the extent that the Board is granted exclusive administrative jurisdiction in mixed cases (outside those processed through the NGP), bargaining unit members and non-members alike should retain the choice to file an appeal directly with the Board or with the agency in accordance with EEO's mixed complaint regulations (with a hearing at the MSPB level).

The mixed complaint process has a variety of advantages. It serves to filter out complaints that might otherwise clog the Board's processes. For the unrepresented, the investigation stage may discover material unavailable to them in the Board's processes because of time constraints or the inability to master discovery techniques. Settlement possibilities can be explored in an atmosphere where perhaps the employee is less intimidated and where the invocation of formal processes does not solidify the positions of the main actors. Finally, the agency is given the opportunity to resolve matters that affect its own employees.[559] Efforts to improve the EEO process at the agency level may make the mixed complaint process even more valuable in these respects.

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[556] *Cf.* 5 C.F.R. § 1201.155(b) (1988).

[557] The Board's administrative judges are currently excepted service attorneys serving at the will of the Board. Affording these officials the protections in terms of salary and tenure of administrative law judges is an additional possible change that might alter perceptions of the Board and ease the way for exclusive MSPB jurisdiction.

[558] *See* 5 U.S.C. §§ 7701(d), (e); 7703(d) (1988).

The existing mixed appeal/mixed complaint regulations are not, however, the easiest to understand.[560] Despite the inherent complications of the process, more could probably be done to clarify and simplify the procedures.[561] In addition, while perhaps not a frequent occurrence, in some instances there are parallel EEO and MSPB filings that, under the regulations, should not both be allowed to proceed. There may also be duplicative filings involving the NGP, which also is not permitted by the CSRA. Better communication among personnel, EEO, and labor relations offices would reduce these multiple proceedings and the wasted time, energy, and other resources.

7. *The Fate of the Special Panel*

Since 1978, there have been three Special Panel proceedings.[562] Congress did not anticipate that the Panel would often be called upon to resolve disputes between the Board and the EEOC.[563]

Since the Special Panel apparatus was originally put in place to insure some adjudicatory role for the EEOC in mixed cases,[564] by definition, a conclusion that continued EEOC involvement is unnecessary would consign it to a place in the history books alone. The problems and disputes that have arisen during its brief tenure[565] seem not to recommend its continuation in any form.

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[559] These procedures may have to be differentiated from those applicable to mixed cases where there will be a trial *de novo* in district court, see *supra* text accompanying notes 526-27, though the option to choose the MSPB over the district court should remain open as long as it is feasible.

[560] Neither are other parts of existing EEOC regulations. For example, a less than experienced practitioner or employee might take the regulations defining the relationship between the NGP and the EEOC as applicable to mixed cases, which apparently they are not. *See* 29 C.F.R. §§ 1613.219, .231, .401-.421 (1988).

[561] The newly proposed EEOC regulations are, in part, an attempt to more clearly define the federal sector process. *See* 54 Fed. Reg. 45,747 (Oct. 31, 1989).

[562] *See supra* text accompanying notes 236-57.

[563] *See* 1978 CONFERENCE REPORT, *supra* note 219, at 142.

[564] *See supra* text accompanying notes 218-24.

The prevailing approach to the authority of the Special Panel (laid down in *Ignacio v. United States Postal Service*) is complex[566] and suggests that the convoluted arrangement creates incentives for the ultimate decision-maker (the Panel) to avoid rather than make its own decision on the merits. Moreover, the structure is so self-evidently contrived as a political compromise rather than a rational approach to design of a structure for the fair and expeditious resolution of personnel disputes that it evokes cynicism rather than confidence on the part of the clients of the system.

If, however, it is thought desirable to retain some form of EEOC review of Board decisions in cases that are significant beyond the individual facts presented, a revision of the Special Panel machinery might be devised to accord with what the Senate proposed in 1978. The Senate bill envisioned the MSPB/EEOC dialogue as focusing on cases where the MSPB order would have "a substantial impact on the general responsibilities of the Commission for implementing the anti-discrimination laws."[567] Accordingly, "decisions and orders which propel case law in a new direction, or which raise significant conflicts with the policies or interpretations of the Commission may be considered."[568]

Section 7702 of Title 5 could, therefore, be amended to specify that the EEOC can accept a petition only if it believes (1) that the case presents an important legal issue of discrimination law or the relationship between civil service and discrimination law, and (2) that the MSPB was incorrect in its disposition of this legal issue. On reference back, the MSPB should be able to disregard the EEOC decision and certify the matter to the Special Panel only if it believes that the EEOC was incorrect in resolving an issue of civil service law or the relationship of civil service and discrimination law. The current composition of the Panel would remain unchanged under this approach, thus assuring an EEOC voice on the Panel. However, requiring MSPB concurrence regarding the

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[565] *See supra* text accompanying notes 236-70.

[566] *See supra* text accompanying note 240.

[567] 1978 S. REPORT, *supra* note 70, at 57-58.

[568] *Id.* at 58. The existing statutory language permits the EEOC to exercise its discretion in this sparing fashion—but the EEOC has chosen to accept most petitions filed for merits review. Congress should, therefore, make its intent clear—if the Special Panel is retained—if for no other reason than cutting down the potential for delay in the system.

EEOC's assessment of the nature of the issue presented and its importance raises the possibility of stalemate. Despite the possibility that the EEOC could make its findings merely to prevent the MSPB from having the last word, it should be assumed that that Commission will not engage in such overreaching.

In addition, the rules of *Ignacio*[569] that prevent a decision on the merits should be abolished by Congress. Rather, once certification occurs, the Panel should be directed to resolve the substantive issues presented with an appropriate deference to the respective expertises of the Board and the EEOC.

Moreover, in order to elevate the importance of the Special Panel proceeding and to deter improvident references, its resolution of the legal issues should be made explicitly binding on both the MSPB and the EEOC absent either judicial reversal on direct appeal or rejection of the Special Panel's resolution by the Supreme Court in other cases or the "overwhelming" weight of circuit court precedent.[570] As in the case of MSPB orders, judicial review of the Special Panel decision (or the EEOC decision where the MSPB does not make the specified finding) should be placed within the jurisdiction of the Federal Circuit though under a very limited scope of review.

8. *Government Access to Judicial Review in Discrimination Cases*

At the present time, when an agency loses a case involving allegations of discrimination before the MSPB, EEOC, the Special Panel, an arbitrator, or the FLRA, its procedural opportunity to obtain judicial reversal is, at best, very limited. When approaching this situation two scenarios should be distinguished: where the underlying personnel action at issue is of the type that could be appealed by the employee to the MSPB, and where this is not the case.

With regard to the latter situation, a discrimination complaint now—and under the proposals contained earlier in this article[571]—may be adjudicated by the EEOC if the employee chooses to opt for the statutory appeal route, or by an arbitrator if the NGP is used. There are no statutory provisions that expressly allow an agency to appeal directly to the courts from an adverse EEOC or arbitrator decision. Rather, the agency may refuse to comply with an EEOC decision, in which case any judicial review would occur in the course of the employee's *de novo* suit in federal court, though preclusion prevents government relitigation of at least some issues.[572]

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[569] *See supra* text accompanying note 240.

[570] The Board has made it clear that it will follow Special Panel decisions deferring to the EEOC on matters of discrimination law even where the Panel decision is inconsistent with lower court precedent (which *Ignacio* was at the time of its issuance and continues to be). *See* Ellis v. U.S. Postal Service, 37 M.S.P.R. 503 (1988).

[571] *See supra* notes 503-08.

In the case of an arbitral award, while an agency may appeal to the FLRA, there is no direct judicial review of the FLRA's decision on the award.[573] Refusal to comply with the award may result in an unfair labor practice proceeding before the FLRA, whose disposition of the case is judicially reviewable, though judicial scrutiny of the underlying arbitral decision may be very narrow indeed—if it exists at all.[574]

With regard to MSPB appealable actions, the situation may be somewhat different. The statute provides that "any final order or decision" of the Board is appealable to the federal circuit by OPM if the "substantial impact on civil service law" test is met.[575] This authority is not limited by express statutory provision to non-mixed cases. While the federal circuit has held that it lacks jurisdiction in mixed cases,[576] the jurisdictional issue should arguably be treated differently where it is the government, and not the employee, that is dissatisfied with the result of the administrative (or arbitral process).[577] In that context there will need be no impingement on the employee's right to obtain a *de novo* hearing on the facts in district court.[578]

Politically, it likely would be difficult, if not impossible, to make a case that the OPM should be able to appeal MSPB, EEOC, arbitral, or FLRA decisions where it is seeking to contest a factual finding of discrimination. Allowing the OPM to contest a legal interpretation in the area of pure discrimination law may encounter less resistance but still is difficult to justify to the extent that the OPM's area of interest and expertise is seen to rest in the arena of pure personnel law.[579]

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[572] *See Moore*, 780 F.2d 1559.

[573] *See supra* note 123 and accompanying text.

[574] American Federation of Government Employees v. FLRA, 850 F.2d 782 (D.C. Cir. 1988).

[575] *See* 5 U.S.C. § 7703(d) (1988).

[576] *See supra* text accompanying note 277.

[577] The Federal Circuit reviews arbitral awards in Chapter 43 and 75 actions outside the mixed case context and the CSRA provides for such review on the same terms as apply to review of MSPB decisions. Other MSPB appealable actions within the NGP that are arbitrated go to the FLRA. Accordingly, in mixed non-Chapter 43 and 75 actions that are arbitrated, the government's opportunity to review, if any, is largely identical to that which exists in discrimination cases that are not MSPB appealable.

[578] *See* Horner v. Schuck, 843 F.2d 1368, 1374 (Fed. Cir. 1988).

The fact that a refusal to comply with administrative or arbitral determinations is necessary before review can be requested (assuming it is then available) is not only inefficient but, by raising the spectre of agency defiance of authority, it casts a pale of illegitimacy over what may be an entirely justifiable claim of legal error. The happenstance that issues of personnel law arise in the context of discrimination cases does not suggest that there is less need for direct judicial review than is available outside the discrimination context. Many of the most important issues of personnel law today are those that require inquiry into the relationship of civil service rules and the anti-discrimination statutes.

In fact, the combination of limitations on the government's right to appeal and employees' rights to choose among several appeal routes means that different legal rules may be applied in the administrative, arbitral, and judicial fora in discrimination cases. For example, the interpretation of the Rehabilitation Act adopted by the first Special Panel proceeding[580] is currently applied by both the EEOC and the MSPB but it has been rejected by the courts. The confusion thereby engendered and the discrimination in terms of applicable legal doctrine are hard to justify.

Accordingly, Congress should clearly provide that the OPM, the agency responsible for the overall administration of the civil service rules and the one agency with a government-wide perspective, should have the same right to directly request judicial review in discrimination cases that it has in other contexts. Specifically, where the Director of the Office believes that a decision of the MSPB, EEOC, FLRA (assuming its arbitral review jurisdiction is retained), or an arbitrator constitutes an incorrect interpretation of civil service law that may have a substantial impact, the Director should be expressly authorized to petition for judicial review. The grant of that petition should remain within the discretion of the reviewing court. Moreover, consistent with the goal of ensuring the uniformity of federal personnel law and uniformity in treatment of the major personnel actions and with current provisions vesting review jurisdiction in the Federal Circuit in non-mixed Chapters 43 and 75 actions, Congress should consider vesting exclusive jurisdiction in the Federal Circuit to hear appeals by OPM. To the extent that the Federal Circuit has exclusive jurisdiction in at least mixed cases, the forum for judicial review will not vary depending on whether the government or the employee seeks judicial review.

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[579] In the latest episode of the *Lynch* saga, *see supra* text accompanying notes 250-56, the Board held that the discrimination laws administered by the EEOC are not "civil service" laws for the purpose of OPM's statutory right to ask for Board reconsideration and do not come within the purview of 5 U.S.C. § 7703(d) (OPM's right to petition Federal Circuit for review). Lynch v. Dep't of Education, 39 M.S.P.R. 319 (1988). The Federal Circuit has granted OPM's petition to explore at least this jurisdictional issue. Where a matter raised involves the interrelationship of pure personnel and discrimination law (generally the grist for the Special Panel mill), a reading of Section 7703(d) to permit Federal Circuit review is clearly reasonable. However, in *Lynch*, the merits issue presented appears to be one of pure discrimination law.

[580] 30 M.S.P.R. 47 (Spec. Pan. 1986).

9. *Agency Administrative Grievance Systems*

Given the trend of recent judicial opinions in the area of implied statutory rights of action under the Civil Service Reform Act,[581] agency administrative grievance systems take on increased importance as perhaps, in some cases, the only avenue of redress that can be invoked by the individual employee (other than the potential assistance of the Office of Special Counsel). Interviews disclosed mixed perceptions regarding whether employees and their representatives do or should trust the ability of these processes to fairly dispose of cases, given the fact that the agency is ultimately the judge in its own case. Clearly, agencies vary in the elaborateness of the procedural protections afforded. But details regarding the nature of the variation government-wide are not currently available. Statistics regarding the usage and effectiveness of these systems, among other things, are lacking. Efforts should be undertaken in order to ensure that these systems in fact provide a fair and efficient method of resolving workplace disputes.

To the extent that non-unit employees now resort to the EEOC process for workplace disputes lacking substance as discrimination matters in order to obtain the intervention of third party neutrals,[582] improvement of the agency administrative grievance systems (by, for example, providing for investigation and recommended decision by a third party) may relieve some of the pressure on the EEO framework and, along the way, expedite resolution of disputes in both arenas.

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[581] *See supra* text accompanying notes 301-07.

[582] *See supra* text accompanying note 352.

10. *The Office of Special Counsel*

One of the most problematic areas for potential reform relates to the role of the Office of Special Counsel. Criticism of its effectiveness was not mooted even by a 1985 General Accounting Office study that failed to find substantial flaws in the OSC's treatment of whistleblower reprisal cases.[583] Whether the OSC has in fact failed its assigned task and, if it has, why this has occurred apparently are not questions that are answered easily in a dispassionate fashion. At a minimum it would seem fair to say that, in view of the breadth of its jurisdiction to investigate and seek corrective and disciplinary action from the MSPB, the financial resources currently available to the Office (and perhaps likely to be available in the foreseeable future) may very well be inadequate to allow the Office to serve effectively as an avenue of resort for federal employees allegedly injured by prohibited personnel practices or other violations of civil service law in the manner desired by the Office's critics.

It may seem alluring to give the Office additional powers and duties. It would be ideal if the Office were staffed (as it may now be) with aggressive individuals endowed with a sense of mission to ferret out and correct abuses of the merit system. Without a larger budget, however, heightened expectations for the operation of the Office are likely to be dashed.

This brings us to the Whistleblower Protection Act of 1989.[584] The House and Senate voted overwhelmingly in favor of the Act against a background of years of criticism of the operation of the OSC in terms of its ability or willingness to protect the interests of federal employees. As late as 1985, the Office took the position that its statutory mandate was to protect the integrity of the merit system through prosecution of those who violated the law and that it was not empowered to "represent individual employees."[585]

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[583] *See* Whistleblower Complainants Rarely Qualify for Office of the Special Counsel Protection, GAO/GGD 85-53, May 10, 1985.

[584] Pub. L. No. 101-12, 103 Stat. 16 (1989); *see* 134 Cong. Rec. S15,328-35 (daily ed. Oct. 7, 1988).

[585] Office of the Special Counsel, a Report to Congress From the Office of Special Counsel/Fiscal Year 1985 at 2, 3 and 8. Such a view received some support in judicial opinions. *See, e.g.*, Frazier v. MSPB, 672 F.2d 150, 162-63 (D.C. Cir. 1982).

The next year, however, it announced that "[t]he focus of all OSC operations is protection of the rights of employees under the merit system through corrective actions and when warranted, the discipline of those who violate the law."[586] That emphasis continued in 1987 as its annual Report to Congress noted that "OSC's most significant achievement during this reporting period was its pursuit and accomplishment of more corrective actions on behalf of more federal employees than in any one year since 1981, as a result of the Office's emphasis on corrective actions, particularly in aid of employees victimized by reprisal for whistleblowing."[587]

Such reassurances apparently fell on deaf ears in Congress. The 1989 legislation establishes that "the primary role of the Office . . . is to protect employees, especially whistleblowers, from prohibited personnel practices" and "that the Office . . . shall act in the interests of employees who seek assistance" from it.[588] While this statutory "clarification" of the OSC's role is beneficial in some respects, it should be noted that the existence of such a declaration may very well be used by dissatisfied federal employees suing in federal court as support for the proposition that the court should order the Office to prosecute corrective actions before the MSPB where there are indications that a prohibited personnel practice has occurred. Federal judges might in some cases accept such arguments[589] despite the presence of what appears to be discretionary language contained in the 1978 statute and retained by the 1989 legislation.[590]

The 1989 legislation does not address the current policy of the Office not to routinely investigate allegations of prohibited discrimination falling within EEOC jurisdiction.[591] At the same time, it deletes the existing authority[592] to defer investigations of "activities [other than prohibited personnel practices] prohibited by any civil service law, rule, or regulation''[593] and grants authority to the OSC to seek corrective and disciplinary action in these cases.[594] The legislative history of the 1989 Act suggests that such authority is meant to cover only ''major abuses of the civil service processes.''[595]

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[586] Office of the Special Counsel, a Report to Congress From the Office of Special Counsel/Fiscal Year 1986 at 5.

[587] Office of the Special Counsel, a Report to Congress From the Office of Special Counsel/Fiscal Year 1987 (draft) at 1.

[588] *See* Section 2(b)(2) Pub. L. 101-12.

[589] *Compare* Dunlop v. Bachowski, 421 U.S. 560 (1975) (where, unlike the CSRA however, the statute used "shall" not "may" with respect to both investigatory and prosecutorial authority).

[590] *See* 5 U.S.C. § 1206(c)(1)(B) (1988) and § 3(a)(11) of Whistleblower Act (adding § 1214(b)(2)).

[591] *See supra* text accompanying notes 287-89.

[592] *See* 5 U.S.C. § 1206(e)(1)(D), (2) (1988).

In view of the focus of this study, perhaps the most striking aspect of the 1989 legislation is its creation of the right of individual employees to seek corrective action from the Board with respect to any ''personnel action'' allegedly taken as a reprisal for whistleblowing—after having requested (but not received) OSC action where the personnel action is not otherwise appealable to the Board.[596] Given the apparently applicable statutory definitions of ''employee'' and ''personnel action,''[597] these provisions give to many more federal employees with respect to many more types of personnel actions than is currently the case the individual right to seek redress from the MSPB—though only in cases where reprisal for whistleblowing is alleged. The impact on the Board's docket is unclear but may be very substantial indeed, particularly if allegations of reprisal for whistleblowing are made routinely in personnel disputes largely to obtain access to the Board's processes. It would be very difficult to come up with a method to cull out meritless claims of reprisal early in the process without raising charges that the Board is insensitive to the protection of whistleblowers.

The 1989 legislation fails to address the interaction between the new right to invoke the Board's processes and section 7121 of Title 5,[598] which makes the negotiated grievance process the exclusive means for resolving many matters within its scope (which could include allegations of reprisal for whistleblowing). The legislation does not expressly prevent an employee from proceeding simultaneously or sequentially through an NGP with a whistleblower matter and to the MSPB under the new right of action. (New Section 1222 of Title 5 expressly preserves existing statutory rights and remedies outside of Chapters 12 and 23 of Title 5). These are perhaps only a few of the unresolved issues that the new legislation raises in this area.

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[593] *See supra* note 590, § 3(a)(11) (adding § 1216(b)).

[594] *Id.* (adding § 1216(c)(2)).

[595] 135 Cong. Rec. H749 (Daily ed. March 21, 1989).

[596] *See* § 3(a)(11) (adding § 1221).

[597] *See* 5 U.S.C. § 2302 (1988).

[598] 5 U.S.C. § 7121 (1988).

The silence of Congress regarding Section 7121 perhaps augurs a tendency toward less than comprehensive consideration of the entire statutory framework established in 1978 in dealing with particular issues that arise. A persistent pattern of focusing on discrete issues without a substantial effort to ascertain the wider ramifications throughout the system of any proposed change will lead to one or more baneful results. Agencies, private attorneys, and the courts will be left with the task of trying to invent a way to put all the pieces together, which is a task that properly lies in the hands of Congress. In addition, the system may evolve into an even more complicated morass that will make its current level of intricacy seem quaintly straightforward even to those who have been able to wade this far into this article. The inefficiency and confusion that would thereby be created and redound to the detriment of everyone—but particularly the hapless federal employee and manager—must be avoided.

11. *Better Communication Within Agencies and to Employees*

Even if all of the changes urged above are instituted by legislation or otherwise, the system for federal employee complaints, grievances, and appeals will remain fragmented and complicated, though choices may have been narrowed and simplified somewhat. To the extent federal managers see "too many reviews/appeals" as an obstacle to taking formal action against employees,[599] the situation may be improved somewhat from a manager's point of view.

A premium must, however, be placed on clarity and simplicity in drafting implementing regulations. Personnel, labor relations, and EEO administrative staff must be well-educated in the system and continually brought up-to-date on the latest changes in the law that impact on the various processes. More consistent patterns of communication among these groups, something that now appears to occur fitfully at best in many agencies, must be established, if only to avoid the costs of parallel, duplicative proceedings in the MSPB, the EEO framework, and/or the NGP. In some instances, internal organizational restructuring might assist here—or systems of computer case tracking.

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[599] *See* U.S. MERIT SYSTEMS PROTECTION BOARD, FEDERAL PERSONNEL POLICIES AND PRACTICES—PERSPECTIVES FROM THE WORKPLACE at 11-12 (1987) (41% of supervisors questioned viewed "too many reviews/appeals" as an obstacle of some significance in taking formal action in performance cases; 32% viewed it as an obstacle in taking formal action in misconduct cases; but 88% indicated they would take formal action when informal measures fail).

Finally, the intended beneficiaries of the system—federal employees—must have easy access to materials that, in as straightforward and as clear a fashion as possible, provide necessary information regarding their rights without swamping them with unnecessary detail.[600]

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[600] The Guide to Rights and Responsibilities in Resolving Disputes in the Federal Government (Nov. 1987) is a good start, though even it may be too detailed and intimidating for most employees.

It might be questioned, for example, whether the dearth of MSPB appeals from the grievance process in mixed cases is due to the lack of express notice in the arbitral award regarding the existence of further appeal rights. *Compare, e.g.*, Smith v. Dep't of the Navy, 37 M.S.P.R. 560 (1988) (an opinion that seems to confuse agency notice of the right to initially appeal to the Board or file a grievance in the NGP with notice of the right to appeal from the NGP to the MSPB) *with* Marenus v. Dep't Health and Human Serv., 39 M.S.P.R. 498 (1989) (Board waives time period for filing given "mistaken" first filing with EEOC).

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